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No. 84-1873

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

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GEORGE JOSEPH WEIDE, JR., Petitioner

v.

THE UNITED STATES, Respondent

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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## QUESTIONS PRESENTED

(1) May a secretary of a military department lawfully subdelegate -- subject to no prescription of standards and with no provision for review after the fact -- the responsibility imposed upon such secretary, designated by office, by Section 207 of the Legislative Reorganization Act of 1946 (later reenacted and codified without here pertinent change as §1552(a) of Title 10, U. S. Code), to make a judgmental determination as to whether correction of a military record in a particular instance is "necessary" in order to correct an asserted error?

(2) Does any presumption of regularity and validity obtain as to acts by government officers and the written records made thereof, in the face of impeaching allegations which are of a nature to permit objective investigation and analysis?

(3) Does the Due Process Clause of the Fifth Amendment require that factual allegations, not on their face improbable as contrary to common experience, which are contained in a petition instituting an action in a court of the United

States, be accepted as the basis for decision by the court to the extent that such allegations have not been specifically countered by the defendant and the plaintiff has not been given any opportunity to present evidence in support of such allegations?

(4) Consonant with the Due Process Clause of the Fifth Amendment, may the equitable doctrine of laches be validly asserted as a basis for moving to dismiss a petition addressed to a court of the United States, in the absence of any assertions by the defendant, (a) that it may reasonably be inferred, from specified allegations contained in the petition that the plaintiff delayed instituting the action, motivated by inequitable considerations; and (b) that the defendant has been harmed by such delay by the plaintiff in specified particulars which are set forth in the plaintiff's petition?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

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No. _____

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George Joseph Weide, Jr., Petitioner

v.

The United States, Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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Petitioner, George Joseph Weide, Jr., seeks a writ of certiorari through this petition to present this Honorable Court with an opportunity to establish that intramilitary procedures for the adjustment of civil conflicts between an in-

dividual member of the Armed Forces and a military personnel class or the service as a whole, were intended by the Congress to be substantive in nature, and are governed by basic requirements of Due Process of Law, especially opportunity to present issues, to have issues presented given two-sided consideration by an impartial person or body, and to have presented issues decided on the record, subject to review by a politically appointed Secretary, for whose decision both he and the appointing Administration may be held publicly accountable. Chappell et al. v. Wallace, et al., 462 U.S. 296 (1983), indicates the statutory procedure followed by the petitioner to be the sole means whereby judicial review may be accorded to a member of the Armed Forces denied direct access to United States Courts by reason of the Feres principle, necessarily implying that such procedure and the review thereof were intended to be of a meaningful quality. Petitioner respectfully requests that a Writ of Certiorari issue to review the final judgment of the United States Court of

Appeals for the Federal Circuit, decided January 18, 1985, petition for rehearing denied February 28, 1985, affirming a decision of the United States Claims Court rendered February 17, 1984, 4 Cl. Ct. 432. Copy of Judgment Order, Appx. i a.

## OPINION BELOW

Appendix 1a through 10a sets forth a copy of the unpublished opinion of the Court of Appeals for the Federal Circuit. Appendix 11a through 15a sets forth the issues presented upon that appeal, which are identified in the opinion only by Roman numerals. The opinion of the Claims Court, 4 Cl. Ct. 432, is copied in the Appendix, 16a through 27a. The petition of the plaintiff (Petitioner here) which initiated the action is essential to demonstrate that the issues raised by the plaintiff were not considered, and is copied in the Appendix, 28a through 79a.

## JURISDICTION

This petition for a writ of certiorari is filed within ninety days of the denial by the Court of Appeals for the Federal Circuit of the Appellant's petition for rehearing (Appx., i a)

in accordance with subsection (c) of Section 2101, Title 28, U. S. Code, and Rule 20.2 of the Rules of this Court. The jurisdiction of this Court is invoked under § 1254(1) of Title 28, U.S. Code. The initial jurisdiction of the United States Court of Claims [becoming the United States Claims Court as of October 1, 1982] was founded upon § 1491 of Title 28, U. S. Code, providing, in pertinent excerpt:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department. . .To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, Clause 14, provides that the Congress shall have power:

> To make Rules for the Government and Regulation of the land and naval Forces;

Article II, Section 2, Clause 2, relating to powers of the President of the United States, provides in pertinent excerpt:

> . . . he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint. . . all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law. . .

Amendment V provides, in pertinent excerpt:

> No person shall. . . be deprived of life, liberty, or property, without due process of law. . .

## STATUTORY PROVISIONS INVOLVED

All events constituting the basis of the Petitioner's initial claim took place prior to December 12, 1980, the date of approval of the Defense Officer Personnel Management Act (PL 96-513, 94 Stat. 2835-2866). References are therefore made to statutes which in several instances were greatly modified or repealed by the 1980 legislation. For convenience of reference, the pertinent text of such statutes is set forth in the Appendix, page 80a et seq.

The Petitioner was appointed as a Second

Lieutenant in the Regular Army, by the President of the United States, by and with the advice and consent of the Senate, pursuant to Art. II, Sec. 2, Cl. 2 of the Constitution, and was subject to separation (otherwise than by direct dismissal by the President, acting individually and personally) only as provided by statutory law. After such appointment, the Petitioner was assigned by the Secretary of the Army to a basic branch -- the Signal Corps, in accordance with 10 U.S.C. § 3063 (Appx. 80a - 81a), and § 3283 (b) (Appx. 82a). Promotion of Petitioner was governed by § 3297 (82a). Particular attention is invited to the provisions of subsection (e) of § 3297 (82a), which prohibited officers from addressing to selection boards considering their records, any reflection upon the character, conduct of motives of any officer, or criticism of any officer. The later enacted 1980 officer personnel legislation contains no such prohibition (82a-83a). § 3303 mandated discharge of certain Regular Army officers who had twice failed of selection and were not eligible for retirement under any provision of

law. (84a)

The statute with which Petitioner's claim is principally concerned is Section 207 of the Legislative Reorganization Act of 1946, later reenacted and codified without here pertinent change as Subsection 1552(a) of Title 10, U. S. Code. The essential effect of that statute was to delegate, to the secretary of a military department, the power which had theretofore been exercised exclusively by the Congress and the President, through the enactment and approval of private relief legislation, to correct military records of that department. The statute has from the outset specified that the secretary shall act "through" a civilian board in exercising that delegated authority, and permits a correction of a record only when the secretary considers it necessary to correct an error or to remove an injustice.

PROVISIONS OF REGULATIONS INVOLVED

The Appendix, beginning at 85a, sets forth pertinent provisions of Army Regulations. These

are Army Regulation (AR) 614-6 of January 8, 1963, governing assignments of personnel, and requiring "clearance" by the central Department of the Army Headquarters branch before effecting a permanent transfer of a member assigned to that branch, and specifying detailed justification which shall be submitted in writing in requesting such "clearance;" and AR 623-105, governing submission of effectiveness reports, making record evaluations of officers.

## STATEMENT OF FACTS

As a Distinguished Military Graduate of the University of Scranton in 1970, the Petitioner received the distinction of being tendered an Appointment in the Regular Army, which he accepted. He was assigned by the Secretary of the Army to the Signal Corps basic branch (Appx. 80a), and after completing basic training was assigned to duty appropriate to that branch, as the sole authorized Communications Officer of a mechanized infantry battalion at Fort Carson, Colorado. The Battalion was one of sixty-some units under the Commanding Gener- of the Fourth Infantry Division, headquartered at Fort Carson. The Fourth Infantry Division had auth-

ority to reassign officers among component units of that Division, but was regulated by AR 614-6 (86a) as being required to obtain central departmental branch "clearance" in advance of making a permanent reassignment of a member of that branch.

Special skill of Petitioner as a rifle marksman (acquired prior to entering the service) made it appear locally desirable to utilize his services in that capacity rather than in performing communications duties appropriate to his Signal Corps branch assignment. He was removed from the communications position in the Battalion and replaced by another Signal Corps officer, and was, as it was thought at the time, permanently transferred to another command unit under the Fourth Infantry Division, which unit was exclusively concerned with maintenance, development, and administration of rifle marksmanship teams.

No "clearance" for Petitioner's transfer was obtained from Signal Corps Branch in Headquarters of the Department of the Army. Entries made in Petitioner's military record at the time made no mention of the transfer or of the circumstances

which had motivated it. Petitioner was successful in the new assignment. Possibly due to the fact that his success might attract attention to his incompatible position, he was removed from that assignment. When he was removed, there was no Signal Corps position for an officer of his grade in any of the Fourth Infantry Division units. He was reassigned to the Battalion from which he had been transferred over 100 days before, with the understanding that he would perform general service duties only until such time as a proper Signal Corps position became available in another command unit.

Petitioner was in the Battalion on his second assignment from March 7 through July 11, 1971. For the first 33 days of that period, he occupied a desk outside the personnel office (adjutant or S-1) and performed such tasks as the personnel officer assigned. He was then directed by the Battalion Commander to perform the newly created function of VOLAR (Volunteer Army) Officer, under the Operations Section (S-3). This entailed his moving to a different building, and he had absolutely no

contact with the personnel officer thereafter. The remaining 92 days that he served in the Battalion on his second assignment were exclusively devoted to duties as VOLAR Officer. During the first 76 days, he was supervised exclusively by Major Park as the S-3; as of June 25, 1971, Major Park became the Executive Officer of the Battalion, and a then Captain Sowa was assigned to the S-3 position. In early July, 1971, Petitioner was informed that a Signal Corps assignment had become available, and he was ordered to that position on July 11 or 12. He was warmly congratulated upon leaving the Battalion upon the fine job he had done in establishing the position of VOLAR Officer.

Some six months later, on reviewing his record while on leave in the Washington, D. C. area, the Petitioner found that his military record had been grossly falsified, with the apparent motive of concealing the actions of officers superior to him in effecting his transfer from the Battalion in November, contrary to Army Regulations. Falsification was effected through the medium of an Officer Effectiveness Report (OER) which was down-

graded relative to one submitted when the Petitioner had been transferred from the Battalion the previous November, but the harm that has resulted was not due to the lowered evaluation. The Department of the Army; the Claims Court; and the Court of Appeals for the Federal Circuit have taken a narrow view of the Petitioner's contentions, and he has at no time been given any hearing or opportunity to introduce evidence as to the true nature of his claim.

The Petitioner's record was falsified to conceal the fact that he had been transferred from the Battalion. It was falsely represented that he had remained in the Battalion continuously, but as of December 1, 1970, with no explanation was removed from the position of Communications Officer and made "Acting Assistant to the S-1" -- a nonexistent position in the Battalion organization.

In 1973, as a result of an administrative protest by Petitioner, the record was altered to reflect that he had been on Special Duty in another unit from December 1, 1970 through March 6, 1971, but no explanation was provided as to how he hap-

pened to be assigned to such duty, or why it was that the Battalion could better function (apparently) without the single Communications Officer it was authorized to have than with the Petitioner -- both during the December - March period when he was indicated as having been in the other unit, and from March to July, after he returned to the Battalion. The comment contained in the evaluation, to the effect that he had tried hard, but was handicapped by working out of his specialty, and had been assigned to another command for that reason, further added to the questions arising in the mind of any reviewer of his record.

The possible implications that Petitioner's removal from the Communications Position may have been due to some blunder or suspected character defect on his part, provided a defensible justification for nonselection of Petitioner for Regular Army retention, to anyone who might have entertained bigoted resentment of Petitioner -- as a member of the ethnic majority -- having later served superlatively as Race Relations/Equal Opportunity Officer with the First Signal Group, 9th Infantry

Division at Fort Lewis, Washington.

Petitioner was not selected for Regular Army retention, notwithstanding a 100% selection opportunity. Implications of record entries relating to his initial ten months of duty at Fort Carson are the only discreditable matter contained in Petitioner's military record. He was precluded by the prohibition of § 3297 (e) (Appx. 82a) from himself inviting attention to the falsification of his record, and efforts to obtain administrative correction resulted only in changes to the extent of eliminating readily demonstrable falsification by three officers superior to him.

Petitioner made repeated applications to the Secretary of the Army for exercise of the delegated legislative authority conferred upon the Secretary by Section 207 of the Legislative-Reorganization Act of 1946 (10 U.S.C. § 1552 (a)), but no such application was referred to a politically appointed secretary. Petitioner has at no time been given a hearing, nor have his assertions of error been discussed on the merits, either in the Department of the Army or in the

Claims Court or Court of Appeals for the Federal Circuit.

REASONS FOR GRANTING CERTIORARI

(1) Determination of Petitioner's applications to obtain correction of his military record have essentially been made by military personnel administrators "acting through" the Army Board for Correction of Military Records, rather than a politically appointed secretary so acting, as contemplated by § 1552 (a). Such was the result that the Congress intended to preclude by requiring that the military department secretary act through a civilian board. In the absence of supervision or review by a politically appointed secretary on a continuing basis, a civilian employee of a military department cannot afford to act counter to the wishes of military officers. The officers will be there after the secretaries have all been replaced, and they have long memories. The only way in which a civilian can follow the dictates of his own conscience is through being able to point out that the action cannot get through the civilian secretary who consistently reviews the cases

and makes up his own mind concerning them.

Blanket delegation of the authority to determine which §1552(a) applications are, and which are not, brought to the attention of a politically appointed civilian secretary, is tantamount to placing full control in the hands of military personnel administrators, who are rarely inclined to acknowledge any fault or error in "the system," and whose tendency is to prefer the "brush off" to analytical inquiry. In the absence of a civilian control presence -- as existed when military personnel administrators might be called to account by having to justify their positions before a Congressional subcommittee considering a private relief bill -- the considerable sums spent in all services on records correction administration, will be largely wasted.

(2) The so-called "presumption of due performance

of official duty" was exploded by Wigmore many years ago.* as being "more often mentioned than enforced, and its scope as a real presumption is indefinite and hardly capable of reduction to rules." Where no other evidence is available, then obviously the record must stand unless it relates something contrary to notorious physical fact. Once the record is challenged, however, then the process becomes one of weighing respective probabilities.

In this case, in which military personnel administrators tacitly recognized and "covered up" blatant falsehoods of three responsible officers, e. g., that an officer had been in "daily contact" with Petitioner during a period when the officer so representing had been in Vietnam and the Petitioner at Fort Carson, Colorado, in another command, then to such extent as there may be any controlling "presumption," it should be the maxim, "falsus in uno, falsus in omnibus."

The net effect of record falsification

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* Wigmore, On Evidence, (3rd ed., Little, Brown & Co., Boston, 1940), § 2534

in this instance has been to cast upon the Petitioner the onus for poor command judgment on the part of his far more experienced superiors. The officers who made the errors have indicated a willingness to acknowledge them, short of donning sackcloth and ashes. The mythical "presumption of regularity" should no longer preclude listening to what they have to say.

(3) In failing to make the allegations of the plaintiff's petition (Appx. 28a) the point of departure for judicial inquiry, the Claims Court denied the Petitioner basic due process of law. Joint Anti-Fascist Refugee Committee v. McGrath is squarely in point. Quoting from the principal opinion of Mr. Justice Burton, in which Mr. Justice Douglas joined, 341 U. S. 123 (1951), at 126:

> We conclude that if the allegations of the complaints are taken as true (as they must be on the motion to dismiss) the Executive Order does not authorize the Attorney General to furnish. . . a list containing such designations as he gave to each of these organizations. . . Under such circumstances his own admissions render his designations patently arbitrary because they are contrary to the alleged and uncontroverted facts constituting the entire record before us. The Complaining organizations have not been afforded any

> opportunity to substantiate their allegations but at this stage of the proceedings the Attorney General has chosen not to deny their allegations and has not otherwise placed them in issue.

In a separate concurring opinion of Mr. Justice Frankfurter, 341 U. S. 123, 169-172, and a separate opinion of Mr. Justice Douglas, 342 U. S. 123, 170, notice and opportunity to be heard are indicated as being fundamental to due process of law.

As in Chappell et al. v. Wallace, et al. 462 U. S. 296 (1983), there is an argument to be made from the standpoint of preserving military discipline, for not giving military subordinates free and open access to United States courts to challenge their superiors. But, as Chappell points out, the Congress has specifically provided the §1552(a) records correction procedure as an available intramilitary forum, and the civilian politically appointed secretary is in an ideal position to reconcile the competing interests among maintenance of command authority, preserving a sound recruiting climate, and presenting a suitable public image. Chappell notes the availability of limited judicial review under the doctrine

of Sanders v. United States, 219 Ct. Cl. 285, 594 F. 2d 804 (1979), in cases in which undue emphasis may have been placed upon the interests of the group as opposed to individual concerns.

For the intramilitary procedure of § 1552(a) to function as a satisfactory alternative to direct United States Court access, the observation must be heeded that "when Congress has given an administrative agency discretion to determine its own procedure, the agency has rarely chosen to dispose of the rights of individuals without a hearing, however informal.* Being given a "hearing" in a meaningful sense, means more than being given an opportunity to speak or write. It implies also being listened to or read, and receiving a response. In cases such as that of Petitioner, involving ascertainable issue of fact and of the proper interpretation and application of service administrative directives and procedures, it is the essence of arbitrariness and capriciousness to refuse to hear out and answer a complainant. Certainly if

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* Mr. Justice Frankfurter, separate concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 168-169 (1951)

instances of claimed deprivation of civil rights are to be presented and determined under the § 1552(a) procedure, as indicated by Chappell, then those who have presented grievances in a respectful manner must receive something more informative than: "Applicant has failed to submit sufficient relevant evidence to demonstrate the existence of probable material error or injustice to warrant a formal hearing." That boilerplate represents the sum total of return thus far for an eight-year investment of effort and resources on the part of the Petitioner.

(4) The very fact that the Claims Court did not decide the case of Petitioner on the basis of laches, provides one of the strongest arguments for examining the abuses which are being perpetrated by misapplication of that doctrine. It is, at historical base, nothing more than a means of applying statutes of limitations to equitable causes, and the rules are that one bringing a suit after the period when a comparable action at law would be barred, bears a burden of showing cause why his

suit in equity should not be barred also. One bringing a suit within the period of limitations may also be barred by laches, but the reason is that he lacks clean hands, in that he delayed bringing his suit when he could have filed earlier, and it may well have been that such delay was deliberate, either to gain an advantage for himself or to prejudice the ability of the opponent. In the latter instance, it is the opponent who bears the burden of establishing both probable inequitable motivation of the delay, and specific harm that has been suffered by reason of the delay.

In Brundage v. United States, 205 Ct. Cl. 502, 504 F. 2d 1382 (1976), cert. denied, 421 U.S. 198 (1975), the Court of Claims fell into the error of presuming harm to the government from delaying the filing of a military pay case, without requiring that the government show either probable inequitable motivation in delaying or specific resulting harm, and such ratio decidendi was carried to a new height in Adkins v. United States, 228 Ct. Cl. 909 (1981).

There is a basic inconsistency between holding that one may be chargeable with laches, even though his delay has been occasioned by pursuing a §1552 application for correction of his record, and Sanders v. United States, supra, holding that arbitrary and capricious action on a §1552 application is the sole basis on which the Claims Court may review such action. One basis cited for charging Adkins with laches, even though he had filed within the statutory six-year period of limitations, was that with respect to some of the earlier subject matter, ". . .He could, however, have brought a mandamus action in district court before that date to challenge his record and passovers." (228 Ct. Cl. 909, 911). The 1983 decision of this Court in Chappell v. Wallace, supra, renders very dubious the authority of a District Court to entertain an action on matters thus involved with military discipline, and would indicate that if another Adkins were to file such an action to-day, he would be told to seek relief by way of a § 1552 application, and then might find that he would be denied Claims

Court review of the §1552 action -- no matter how arbitrary and capricious it may have been -- because the military department had delayed too long in processing that application.

The practical vice of this misguided position is that the period of delay that is too long is within the personal discretion of each individual judge in each case. A lawyer representing the government is constrained to raise the laches issue in every case. Such will represent a far simpler and quicker disposition than a trial on the merits. Since he or she is not required to allege any basis other than the mere fact of delay by the plaintiff in instituting the action, no investigation is required. By repeating platititudes concerning laches, the necessity of thought, research, and painstaking examination of records and knowledgeable persons is delayed, and may be avoided altogether.

By avoiding a decision on the issue of laches, and granting a defense motion for summary judgment, as was done in the Claims Court in the

instant case, a grossly unfair advantage is given the defendant. The judge avoids reversal on the laches issue, which the plaintiff has addressed as the only one raised, and on appeal the plaintiff can do little more than reassert the factual situation, which the appellate court assumes to have been fully explored by the trial court and resolved contrary to the plaintiff's assertions.

It is basic sound pleading practice to dispose of one contested issue at a time. If the defense chooses to raise the laches defense, it should be decided on the record, once and for all, before going into the factual merits. There should follow a pre-trial conference between counsel to settle upon agreed facts, with trial following as to issues in dispute. To such extent as the Department of the Army did not come forward with any showing that factors other than plaintiff's erroneous record may have caused plaintiff's nonselections, he was entitled to rely upon the inference that such was the cause. The Department of the Army had available to it the data necessary to make such a showing if it

could be made. The laches issue was used to obscure this basic proposition of procedural fairness, thereby denying due process of law to the petitioner.

## CONCLUSION

A writ of certiorari should issue to the Court of Appeals for the Federal Circuit to permit full consideration by this Court of the questions presented concerning constitutionally sound procedures for review by military departments of administrative action completed in the past, anc concerning the proper ambit of judicial review thereafter and procedures for conducting such review. Sanders v. United States, 219 Ct. Cl. 285, 594 F. 2d 504, broke new ground in 1979 in holding judicially reviewable determinations made under Section 207 of the Legislative Reorganization Act of 1946, to such extent as those determinations were found to have been arbitrary, capricious, unsupported by substantial evidence, or otherwise not in accord with law. Chappell v. Wallace, 462 U. S. 296 (1983), vastly enhanced the importance of the general question by holding

that in situations where serious disruption of military discipline might result from actions filed by military personnel in courts of the United States, access to such courts would be denied, and the personnel concerned relegated to such intramilitary relief procedures as the Congress may have by law provided. The procedure afforded by § 1552, U. S. Code, stemming from Section 207 of the Legislative Reorganization Act of 1946, is the only intramilitary procedure which explicitly undertakes to give a member of the armed forces a civilian approach to and determination respecting problems encountered in military administration. It is further the only such procedure as to which an avenue of possible review in courts of the United States, however circumscribed such review, has been opened.

The practice followed respecting the plea of laches in military pay cases since the 1972 decision of the Court of Claims in Cason v. United States, 198 Ct. Cl. 650, 461 F. 2d 782, has gone far toward destroying military law practice in

the field of challenging administrative action taken in the military departments. To such extent as Chappell v. Wallace may produce new potential clients, counsel to represent them will become unavailable unless this field of the law is made one in which there is two-sided procedural fairness and reasonable predictability of result. Cases such as that of the instant petitioner which present genuine issues of factual and legal error -- as distinguished from nebulous assertions of "injustice" -- are relatively rare, and when one arises it is disheartening to have it disposed of on the Procrustean bed. For this reason, the case is believed to merit a full review upon writ of certiorari.

Respectfully submitted,

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May 29, 1985

# APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 84-1061
354-82C

GEORGE JOSEPH WEIDE, JR.
Plaintiff-Appellant
v.
THE UNITED STATES
Defendant-Appellee

JUDGMENT

ON APPEAL from the U. S. CLAIMS COURT

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED

DATED January 18, 1985

ENTERED BY ORDER OF THE COURT
George E. Hutchinson, Clerk

/s/ George E. Hutchinson
Clerk

Petition for Rehearing
Denied February 28, 1985

Suggestion for Rehearing
In Banc, Declined
March 11, 1985.

ISSUED AS A MANDATE: March 21, 1985
COSTS: Against Appellant
Printing. . . . .$37.60
Total. . . . . ..$37.60

APPENDIX

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

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Appeal No. 84-1061

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George Joseph Weide, Jr.,

Appellant,

v.

The United States,

Appellee.

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Appeal from United States Claims Court decision in Weide v. United States, 4 Cl. Ct. 432 (1984), wherein the Claims Court granted the Government's motion for summary judgment.

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Argued: October 4, 1984
Decided: January 18, 1985
Petition for Rehearing Denied: February 28, 1985
Suggestion for Rehearing In Banc Declined: March 11, 1985

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Before DAVIS, KASHIWA, and NEWMAN, Circuit Judges

KASHIWA, Circuit Judge.

DECISION

George Joseph Weide, Jr. (Weide) appeals from the decision in Weide v. United States, 4 Cl. Ct. 432 (1984), wherein the Claims Court granted the Government's motion for summary judgment. On the basis of the opinion of Judge Tidwell of the Claims Court, we affirm.

OPINION

We have reviewed the documents and briefs submitted on this appeal, and frankly we are perplexed as to several of the issues Weide believes are before this Court.

Judge Tidwell stated, 4 Cl. Ct. at 436, that the court did not reach the issue of summary judgment under the doctrine of laches, and therefore this issue, Weide's issues I, II, and III, is not before us. Furthermore, as we understand Weide's Issue I, he is apparently asking us to overrule several prior decisions of the Court of Claims, a proposition we are in no position to entertain.

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[Petitioner's note: Appendix, 11a Issues presented by Appellant's appeal.]

Similarly, Weide's Issue V is not properly before this court for review inasmuch as the Claims Court viewed the Government's motion to dismiss for failure to state a claim upon which relief can be granted as merged into its motion for summary judgment since the Government had submitted a certified administrative- record and both parties had moved for summary judgment and filed supporting briefs therefor.

Likewise, the Government contends that Weide's Issues VIII and IX, that the Secretary of the Army or some political appointee must have personal cognizance of, and ensure the preparation of a properly reviewable record for, any issues raised by an applicant pursuant to 10 U.S.C. §1552, are not before this court inasmuch as they were not raised in the Claims Court. It does not appear to us that these issues, as framed on appeal, were presented for consideration by the Claims Court, and this court has held that it will not address on review important issues withheld from a lower tribunal. Cf. Lizut v. Department of the Army, 717 F.2d 1391,

1395-96 (Fed. Cir. 1983). Even assuming, arguendo that paragraph 23 of Weide's Complaint, as filed in the Claims Court, put these issues before the court, a fair construction of 10 U.S.C. §1552(a) is that the Army Board for Correction of Military Records (ABCMR), once its procedures have been established by the Secretary of the Army, acts pursuant to the authority delegated to the Secretary by Congress as his representative to correct any military record when it is necessary to rectify an error or remove an injustice. There are no indicia, and Weide has presented no factual evidence on this point, that Congress intended to require that the Secretary, or a political appointee, become personally involved in the record correction procedure.

Moreover, Chappell v. Wallace , 103 S. Ct. 2362 (1983), a case cited by Weide, supports this construction. Chappell involved the issue of whether enlisted military personnel may maintain suits to recover damages from superior officers for injuries sustained as a result of violations of constitutional rights in the cause of military

service. Id. at 2363-64. The Court recognized that Congress had exercised its plenary constitutional authority over the military to enact statutes regulating military life and to provide an internal comprehensive system of justice, taking into account the special patterns that define the military structure. Id. at 2366. As one example of remedial administrative procedures available to military personnel, the Court noted that "[t]he Board of Correction of Naval Records, composed of civilians appointed by the Secretary of the Navy, provides another means with which an aggrieved member of the military 'may correct any military record. . . when [the Secretary of the Navy acting through the Board] considers it necessary to correct an error or remove an injustice.' 10 U.S.C. §1552(a)." Id. at 2367 (emphasis added). The Court further described actions under this statute, always referring to actions taken by the Board, rather than by the Secretary. The logical inference from this is that Congress did not implicitly

mandate or intend that the Secretaries of the various military departments become personally involved in record correction procedures. Rather, the ABCMR has been delegated the authority to act in the Secretary's stead.

A rebuttable presumption of regularity, correctness, and good faith attaches to administrative actions, including the actions of military administrators. Crispino v. United States, 3 Cl. Ct. 306 (1983). Judge Tidwell, having reviewed all party submissions including the administrative record and summary judgment briefs, concluded that Weide had not alleged sufficient facts to show that the Army had failed to maintain a correct record of his assignments and performance ratings, or to show that the ABCMR had incorrectly performed its administrative functions. The burden is on Weide to overcome this presumption at the trial level, and on appeal he must show how or where the Claims Court erred in reviewing the evidence and reaching its decision. Weide has presented only conclusory statements as to "the possibility if not

probability" of the falsity of his records, without alleging any specificity as to facts wrongly considered, ignored, or not yet before the court, or erroneous conclusions of law, and we will not say therefore that the Claims Court erred in holding that Weide failed to overcome the presumption of correctness of the ABCMR's actions.

Weide alleges that the Claims Court erred by misinterpreting the regulation applicable to the preparation of Officer Effectiveness Reports (OERs), Army Regulation 623-105, paragraph 2-5(1) (10 Sept. 1970), by quoting only the exception to the general rule, without referring to the general rule. The pertinent portion of paragraph 2-5(1) reads as follows (emphasis on the part quoted by Judge Tidwell):

> A report will be prepared by the immediate superior in the rated officer's chain of command or staff who is in the best position to have personal or official knowledge of the duty performance of the rated officer. <u>In some cases the immediate superior may not be an officer of the unit to which the rated officer is assigned but he may be the supervisor of the rated officer's principal duty</u>.

As we see it, the part of paragraph 2-5(1) quoted by Judge Tidwell is the only portion of the regularion which may be favorable to Weide's

position, and the general rule, far from supporting his position, is actually damaging to it. The general rule requires that an OER be prepared by an immediate superior in the rated officer's chain of command who is in the best position to have personal or official knowledge of the duty performance of the rated officer. Weide was assigned during the period in question to the Tenth Infantry, with a principal duty as Acting Assistant, S-1. Therefore, Captain Voris was his immediate superior in his chain of command, and was required by the general rule to prepare Weide's OER. While still assigned to the Tenth Infantry, with principal duty as Acting Assistant S-1, Weide was given the major additional duty as VOLAR Officer, under the supervision of Major Park. To prevail on this issue, the burden of proof was on Weide to show that his principal duty was VOLAR Officer, thereby allowing Major Park to prepare his OER as the "supervisor for the rated officer's pri-cipal duty." The ABCMR concluded that the 1971 OER prepared by Captain Voris was properly submitted pursuant to Army Regulation

623-105. The Claims Court upheld the ABCMR decision, noting that Weide had failed to show that ABCMR's actions were illegal under Sanders v. United States, 594 F. 2d 804, 219 Ct. Cl. 285 (1979), had failed to establish an adequate nexus between the 1971 OER and his subsequent discharge, and that he had not alleged sufficient facts showing error which substantially affected the Army's decision. Even though an inapposite section of paragraph 2-5(1) may have been quoted, if this be error, it is harmless, and we likewise perceive no error in Judge Tidwell's rationale for upholding the decision of the ABCMR. Moreover, we note that Weide's reliance on Evensen v. United States, 654 F.2d 68, 228 Ct. Cl. 207 (1981), is misplaced. In Evensen, the Court of Claims noted that an OER prepared by the wrong rater, which the correction board had previously vound to be prepared by an improper rater, is not a trivial, insubstantial, or technical error. The conclusion that an improperly prepared OER is harmful error does not go to Weide's burden

to establish that the 1971 OER_ was prepared by an improper rater in the first instance.

Finally, Weide alleges error in the fact that Judge Tidwell stated at various points in the opinion that Weide was not selected for promotion. While we recognize that it would have been technically more accurate to state that Weide was not selected for the permanent rank of Captain, we fail to see how there was any harmful error in this. The net result is the same whether we speak of not being promoted to a grade or not being selected for a permanent grade--Weide would be discharged.

[End of Court of Appeals Opinion]

ISSUES PRESENTED BY APPELLANT
ON APPEAL FROM UNITED STATES CLAIMS COURT
TO COURT OF APPEALS FOR THE FEDERAL CIRCUIT

(Mentioned by Number
In Court of Appeals Opinion
Appendix, Pages 2a and 3a)

I. RULES CONCERNING LACHES IN MILITARY PAY CASES LAID DOWN IN CASON v. UNITED STATES, 461 F. 2d 782 (1971) AND BRUNDAGE v. UNITED STATES, 504 F. 2d 1382 (1974), AND EXTENDED IN ADKINS v. UNITED STATES, 228 Ct. Cl. 909 (No. 420-80C, DECIDED SEPTEMBER 29, 1981, PER CURIAM), ARE UNSOUND ON BASIC PRINCIPLES OF EQUITY JURISPRUDENCE.

II. THE CIVIL SERVICE REFORM ACT OF 1978 (PL 95-454 APPROVED OCTOBER 13, 1978), OBVIATED CONTINUATION OF THE ABERRATION OF UNITED STATES EX REL. ARANT v. LANE, 249 U. S. 367 (1919), FOLLOWED IN NICHOLAS v. UNITED STATES, 257 U. S. 71, AND NORRIS v. UNITED STATES, 257 U. S. 77 (BOTH 1921).

III. IT IS PROCEDURALLY UNSOUND TO PERMIT LACHES TO BE ASSERTED AS A BASIS FOR MOVING TO DISMISS A PETITION AS FAILING TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

IV. THERE IS NO PRESUMPTION OF CORRECTNESS AND REGULARITY OF OFFICIAL ACTS BY

GOVERNMENTAL AGENTS AND RECORDS OF THE PERFORMANCE OF SUCH ACTS, IN THE PRESENCE OF A PLAUSIBLE CHALLENGE TO THE FACTUAL ACCURACY OF SUCH RECORD MADE BY ONE WHO HAD AN OPPORTUNITY TO OBSERVE AND EXPERIENCE THE MATTER RECORDED.

V. IN CONSIDERING A MOTION TO DISMISS A PETITION AS FAILING TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, IT IS REQUIRED THAT EVERY FACT ASSERTED IN THE PETITION BE TAKEN AS ESTABLISHED, AND EVEN THEN THE PETITION MAY NOT BE DISMISSED UNLESS IT APPEARS THAT THE PLAINTIFF COULD PROVE NO FACTS WHICH WOULD ENTITLE HIM TO RELIEF.

VI. IN CONSIDRING A MOTION BY THE DEFENDANT FOR SUMMARY JUDGMENT, EVERY FACT ASSERTED IN THE PETITION MUST BE TAKEN AS ESTABLISHED, EXCEPT ONLY TO SUCH EXTENT AS MATTER ADDUCED BY THE DEFENDANT HAS AFFIRMATIVELY DEMONSTRATED THE CONTRARY.

VII. IT IS OBLIGATORY UPON A SECRETARY OF A MILITARY DEPARTMENT TO ASSURE THAT THERE IS MAINTAINED A SYSTEM OF RECORDS WHICH WILL CURRENTLY PRESENT ON A FAIR, EQUITABLE AND IMPARTIAL BASIS, THE ASSIGNMENTS OF EACH OFFICER OF THE ARMED FORCES OF THE UNITED STATES SERVING UNDER THAT DEPARTMENT, AND THE QUALITATIVE PERFORMANCE OF SUCH OFFICER IN EACH ASSIGNMENT.

VIII. IT IS OBLIGATORY UPON A SECRETARY OF A MILITARY DEPARTMENT TO HAVE MADE KNOWN TO HIM OR HER OR TO A POLITICALLY APPOINTED UNDER SECRETARY OR ASSISTANT SECRETARY, THE ISSUES RAISED BY AN APPLICATION, MADE PURSUANT TO § 1552 OF TITLE 10, U. S. CODE, TO THE SECRETARY FOR CORRECTION OF THE MILITARY OR NAVAL RECORD RELATED TO SERVICE UNDER THAT DEPARTMENT BY ONE WHO AT THE TIME WAS A DE JURE MEMBER OF THE U. S. ARMED FORCES.

IX. THE DECISION OF THE SUPREME COURT OF THE UNITED STATES ON JUNE 13, 1983, IN THE CASE OF CHAPPELL et al. v. WALLACE et al., ____ U. S. ____, 76 L. Ed. 2d 586, 592-3, 51 LW 4733, 4735, INDICATES THAT § 1552 OF TITLE 10, U. S. CODE, REQUIRES COGNIZANCE BY A POLITICALLY APPOINTED SECRETARY OF A MILITARY DEPARMENT OF EACH APPLICATION MADE TO THAT DEPARTMENT, PURSUANT TO THAT STATUTE, TO ASSURE THAT A RECORD HAS BEEN MADE OF THE ISSUES PRESENTED BY SUCH APPLICATION AND THE DECISION OF EACH SUCH ISSUE WHICH IS ADEQUATE TO PERMIT LATER REVIEW THEREOF BY THE UNITED STATES CLAIMS COURT OR A UNITED STATES DISTRICT COURT IN ACCORDANCE WITH THE CRITERIA OF SANDERS v. UNITED STATES, 594 F. 2d 804, 812, AND BY A UNITED STATES COURT OF APPEALS UPON

APPEAL OF THE DECISION OF THE CLAIMS COURT OR DISTRICT COURT UPON SUCH REVIEW.

X. THE DECISION OF THE UNITED STATES CLAIMS COURT IN THE INSTANT CASE IS PREMISED UPON A MISINTERPRETATION OF THE OBVIOUS PLAIN MEANING OF A PROVISION OF ARMY REGULATIONS APPLICABLE AT THE TIME, CAUSED BY A QUOTATION BY A MILITARY PERSONNEL ADMINISTRATOR PRIMARILY RESPONSIBLE FOR THE ADMINISTRATION OF SUCH REGULATION, OUT OF CONTEXT, OF A SENTENCE STATING AN EXCEPTION TO THE GENERAL RULE, WITHOUT STATING THE GENERAL RULE SET FORTH IN THE IMMEDIATELY PRECEDING SENTENCE OF THE REGULATION. THE CLAIMS COURT WAS MISLED BY THAT QUOTATION OUT OF CONTEXT . . . [4 Cl. Ct. 432, 435, 2d column, middle of page]. . .NOTWITHSTANDING ITSHAVING BEEN PLAINLY POINTED OUT AT PAGES 21-22 OF THE PLAINTIFF'S PETITION . . .[Appendix reference]. . .

XI. THE OPINION OF THE CLAIMS COURT PROCEEDS UPON THE FALSE ASSUMPTION THAT THE PLAINTIFF (HERE, THE APPELLANT) WAS "TWICE NON SELECTED FOR PROMOTION." . . . [4 Cl. Ct. 432, initial sentence of opinion]. . . THE APPELLANT HAD AT ALL TIMES SINCE JUNE, 1974, HELD THE GRADE

AND RECEIVED THE PAY AND ALLOWANCES APPLICABLE TO THE GRADE OF CAPTAIN, PAY GRADE O-3, AS PROVIDED BY § 204 OF TITLE 37, U. S. CODE. THE SELECTION FOR APPOINTMENT AS A CAPTAIN, REGULAR ARMY, WHICH WOULD HAVE CARRIED WITH IT NO CHANGE IN RANK OR PAY ENTITLEMENT, WAS, IN LEGAL EFFECT, AN ELIMINATIVE OR REVERSE SELECTIVE PROCEEDING TO DETERMINE WHETHER THE PLAINTIFF SHOULD REMAIN ON ACTIVE DUTY IN THE GRADE CURRENTLY HELD -- NOT WHETHER HE SHOULD BE ADVANCED TO A HIGHER GRADE. UNITED STATES v. TESTAN, 424 U. S. 392 (1976), POINTS OUT AT 402 THAT THE ELIMINATIVE ASPECT OF A SELECTIVE PROCEEDING [IS] NOT IMMUNIZED FROM JUDICIAL REVIEW NOR FROM JUDICIALLY DIRECTED RECORD CORRECTION WHEN SHOWN BY SUCH REVIEW TO HAVE BEEN CONDUCTED OTHERWISE THAN IN ACCORDANCE WITH GOVERNING LAW, AS IS NOTED IN SANDERS v. UNITED STATES, 594 F. 2d 804, 810 (1979).

XII. THE ERRORS OF THE CLAIMS COURT POINTED OUT IN X. AND XI., ABOVE, WOULD IN ALL PROBABILITY HAVE BEEN OBVIATED HAD OPPORTUNITY BEEN ACCORDED FOR ORAL ARGUMENTS UPON DEFENDANT'S MOTION TO DISMISS THE PETITION OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, AND THE PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT.

4 United States Claims Court Reporter 432

George Joseph WEIDE, Jr., Plaintiff

v.

The UNITED STATES, Defendant

No. 354-82C.

United States Claims Court

Feb. 17, 1984.

Former serviceman brought action for review of decision of Army Board for the Correction of Military Records not to correct certain records. The Claims Court, Tidwell, J., held that: (1) Court had jurisdiction to review the determination, but (2) former serviceman did not show failure to correct was cause of failure of former serviceman to obtain promotion some five to six years after the date of the records in question.

Dismissed.

Homer A. Walkup, Alexandria, Va., for plaintiff.

Alexander Younger, Washington, D. C., with whom was Acting Asst. Atty. Gen. Richard Willard, Washington, D. C., for defendant.

OPINION ON DEFENDANT'S MOTION TO DISMISS AND ON CROSS-MOTIONS FOR SUMMARY JUDGMENT.

TIDWELL, Judge:

This is a military pay case in which plaintiff, George Joseph Weide, was honorably discharged from the United States Army after being twice non selected for promotion. Plaintiff al-

leges that he was not promoted because of an Officer Efficiency Report (OER) which he asserts was completed by an improper rating officer in violation of Army regulations. Plaintiff seeks an order directing the removal of the offending OER, setting aside his discharge, and restoring him to active duty. Plaintiff also seeks an order requiring certain corrections in his military record and either promoting him to the grade of Captain in the Army or establishing a special selection board to consider him for promotion.

Defendant has moved to dismiss this action on the ground that plaintiff has failed to state a claim upon which relief can be granted or in the alternative, for summary judgment on the grounds that (1) there is no genuine issue of material fact and defendant is entitled to judgment as a matter of law and (2) plaintiff's action is barred by the equitable doctrine of laches. Plaintiff has filed a cross-motion for summary judgment.

FACTS

In September of 1970, plaintiff, then a second lieutenant in the United States Regular Army, was assigned as Communication Officer of the Second Battalion, Tenth Infantry Division at Fort Carson, Colorado (Tenth Infantry). Shortly after his assignment to the Tenth Infantry, plaintiff was transferred to the Marksmanship Training Unit (MTU) of the Fourth

Infantry Division. Plaintiff performed special duty with the MTU from November 23, 1970 until March 6, 1971. Plaintiff was then reassigned to the Tenth Infantry as a result of a reduction in MTU personnel.

Upon his return, plaintiff was assigned as Assistant S-1, reporting to Captain Stephen M. Voris. On April 10, 1971 plaintiff was given the additional duty of serving as a VOLAR (Volunteer Army) officer, responsible for promoting the all volunteer army. He was moved to a separate building and performed his VOLAR duties under the supervision of Major Peter R. Park. Major Park became the Executive Officer of the Tenth Infantry on June 25, 1971 and was replaced by Captain Sowa. Plaintiff served under Captain Sowa until July 11, 1971. On July 11, 1971, after having been promoted to First Lieutenant, plaintiff was reassigned to the position of Communication Officer of the First Battalion of the 29th Field Artillery Division at Fort Carson. Following this change of duty, an Officer Efficiency Report (LER) was completed evaluating plaintiff's performance. The rating officer was Captain Stephen M. Voris, the indorser was Major Peter R. Park, and the reviewer was Lieutenant Colonel George J. Pierce, Commander of Tenth Infantry. The OER covered the period of December 1, 1970 to July 11, 1971. The rater, Captain Voris, commented that the plaintiff "per-

formed his duties in an extraordinary manner," and ranked plaintiff in the 77th percentile of officers of plaintiff's grade and branch known by Captain Voris. He also recommended that plaintiff be promoted along with his contemporaries and receive advanced course signal corps education. Major Park, who signed plaintiff's OER as indorser, stated that he was unable to evaluate plaintiff's performance because plaintiff had not been under his supervision for a 60-day period. The OER was submitted in August of 1971.

In early 1972, plaintiff reviewed his military records and discovered a number of errors. There was no record of his transfer to the MTU or of his reassignment back to the Tenth Infantry. The duration of his stay in the Tenth Infantry in a non-signal corps capacity was listed incorrectly and his OER for the period of December 1, 1970 to July 11, 1971 had lower markings than those on the immediately preceding OER. Plaintiff first discovered these alleged errors just prior to receiving orders for duty overseas. However, it was not until after his return from overseas duty on September 18, 1973 that plaintiff appealed the errors in his military record. The Military Personnel Center granted plaintiff relief but limited it to the insertion of a memorandum in plaintiff's record indicating that plaintiff had served in the MTU

from December 1, 1970 to March 7, 1971, that the duration of the December 1, 1970 to July 11, 1971 OER should be reduced to cover only the period from March 7, 1971 to July 11, 1971, and that plaintiff's military record should be adjusted so that the dates more accurately reflected the number of days plaintiff spent in the Tenth Infantry in his non-signal corps capacity. The gap in time left by this adjustment was filled by the inclusion of the statement "not rated period." Plaintiff was informed that his appeal would be reconsidered if he submitted additional evidence, such as a copy of his assignment or temporary duty orders, or an extract of a unit morning report, or a certified copy of the rating scheme in effect at the time together with a statement from Captain Voris.

Plaintiff alleges that he was not satisfied with the action taken by the Military Personnel Center but aside from consulting a career counselor in early 1974, he took no further action until December of 1977, when he applied for relief to the Army Board for Correction of Military Records (ABCMR).

Meanwhile, in June of 1974, plaintiff was temporarily promoted to the grade of Captain in the Army of the United States (AUS).[1] The

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1. 10 U.S.C. 3442(c).

The following year, in 1975, plaintiff received a letter from the Department of Army Headquarters informing plaintiff that he was among 2700 Army officers of which 2200 were projected to be separated from the Army. Plaintiff responded to the notification by letter reminding the Army among other things, that the unrated time in his records was spent in the MTU. Later plaintiff was advised that he had been selected for retention and that no reference to the projected reduction would be included in his military records. Apparently, in the course of this correspondence the memorandum that explained the reduction in time of the 1971 OER was removed. While plaintiff was not separated from the Army during the following two years, 1976 and 1977, neither was plaintiff selected for promotion.

In December 1977 and again in January 1978, plaintiff applied to the ABCMR requesting that his non-selections for promotion be set aside and that he be retained by the Army pending correction of his military record. He also requested that he be further considered for promotion to the regular grade of Captain. These applications were denied. Plaintiff was honorably discharged from the regular Army on February 1, 1978 and appointed a Captain, U. S. Army Reserve, Signal Corps Branch, but was not ordered to active duty.

Beginning on June 20, 1978 plaintiff made repeated applications with the ABCMR for

correction of his military records. Plaintiff sought the same basic relief in all of the applications: removal of the 1971 OER prepared by Captain Voris and substitution with a more favorable OER prepared in 1978 by Major Park[2], together with corrections in his record to remove evidence of his 1978 release from active duty.

Included with the applications were written statements by Major Sowa, Major Park, LTC Pierce, Captain Bell and Captain Voris. The statements, while somewhat contradictory, generally state that plaintiff was under Captain Voris' immediate supervision for less than 60 days.[3] The ABCMR repeatedly denied plaintiff's application without a hearing, noting that the plaintiff had failed to show probable material error or injustice and that plaintiff had failed to provide an official rating scheme or orders showing that Captain Voris was not plaintiff's

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2. The delayed 1978 OER covers the period of time from March 7, 1971 to July 12, 1971 and rates plaintiff in the 98th percentile.

3. The applicable Army regulations at that time required the rating officer to have supervised the officer to be rated for a minimum of 60 days. Army Regulations 623-105 September 10, 1970).

proper rater.[4] The ABCMR's third and last denial was issued on September 2, 1981.

Plaintiff filed suit in this court on July 19, 1982.[5] On July 27, 1983, defendant moved for dismissal, or in the alternative, for summary judgment. Jurisdiction is proper under the Tucker Act, 28 U.S.C. § 1491.

DISCUSSION

We initially turn to Defendant's Motion to Dismiss for failure to state a claim upon which relief can be granted. RUSCC 12(b) provides that a motion to dismiss for failure to state a claim upon which relief can be granted is to be treated as a motion for summary judgment when matters outside the pleadings are presented and accepted by the court. Because defendant has

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4. Plaintiff's application was referred several times to the Evaluation Report Branch of the United States Army Military Personnel Center for an expert opinion as to the correctness of the OER. The branch concluded that there was nothing in the application and statements submitted which suggested a change in the OER.

5. Plaintiff originally filed suit in the United States Court of Claims on November 2, 1981, however, the petition was dismissed without prejudice for verbosity.

submitted a certified administrative record[6] and both parties have moved for summary judgment and have filed briefs in support thereof, we will view Defendant's Motion to Dismiss as having merged into its Motion for Summary Judgment. See Moffett v. Commerce Trust Co., 187 F. 2d 242, 249 (8th Cir.) cert. denied, 342 U. S. 818, 72 S. Ct. 32, 96 L. Ed. 618 (1951).

Summary judgment is appropriate only when there is no material issue of fact and the moving party is entitled to judgment as a matter of law. South Louisiana Grain Services, Inc. v. United States, 1 Cl. Ct. 281, 289 (1982). After careful review of all the party submissions, including the administrative record, this court concludes that there is no genuine issue of material fact and this action is ripe for summary judgment.

In this case, plaintiff is seeking review of a decision of the ABCMR. Section 1552(a) of 10 U.S.C. empowers the Secretary of the Army, acting through boards of civilians, to correct the military records of that branch "when he considers it necessary to correct an error or remove an injustice. It is well settled that this court has jurisidction to review such cor-

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6. The certified administrative record consists of plaintiff's official military personnel file and the retained file of the Army Board of Correction of Military Records pertaining to plaintiff.

rections, or as alleged here, failure to correct; however, the scope of review is narrow. Crispino v. United States, 3 Cl. Ct. 306, 312 (1983); Sanders v. United States, 219 Ct. Cl. 285, 300, 594 F. 2d 804, 812; Skinner v. United States, 219 Ct. Cl. 322, 333, 594 F. 2d 824, 831 (1979). As this court has held on numerous occasions:

> Once a plaintiff has sought relief from the Correction Board, such plaintiff is bound by the board's determination unless he can meet the difficult standard of proof that the Correction Board's decision was illegal because it was arbitrary or capricious or in bad faith, or unsupported by substantial evidence, or contrary to law, regulation or mandatory pbulished procedure of a substantive nature by which plaintiff has been seriously prejudiced, and money is due.

Sanders v. United States, 219 Ct. Cl. 285, 298, 594 F. 2d 804, 811 (1979). See Heisig v. United States, 719 F. 2d 1153 (Fed. Cir. 1983). Additionally, a decision of the Correction Board which is in error or unjust is reversible only if it is substantial and prejudicial to plaintiff. Sanders v. United States, 219 Ct. Cl. at 329, 333, 594 F. 2d at 828, 830-831.

Plaintiff argues that because he was not under the immediate supervision of Captain Voris for the required 60 days while assigned as VOLAR officer, the OER prepared by Captain Voris in 1971 should be invalidated in order to accept the delayed OER prepared by Major Park in 1978.

The ABCMR, after considering the statements by Captain Voris, Major Sowa, Major Park, LTC Pierce and Captain Bell as well as the previous applications, concluded that the 1971 (Captain Voris) OER was submitted in accordance with the provisions of Army Regulation 623-105 paragraph 2-5(1) (September 10, 1970) which read in part: "In some cases the immediate superior may not be an officer of the unit to which the rated officer is assigned but he may be the supervisor for the rated officer's principal duty." The ABCMR further concluded that the statements submitted by Captain Voris, Major Sowa, Major Park, LTC Pierce and Captain Bell were contradictory and that without a rating scheme or similar supporting documentation. there was no basis for voiding the OER prepared by Captain Voris in 1971. Even though Captain Voris may not have been plaintiff's immediate supervisor for VOLAR duty, it was not clear to the ABCMR that Captain Voris was an improper supervisor or rater for plaintiff's principal duty.

We uphold the ABCMR's decision. Plaintiff has not only failed to carry his burden of showing that the ABCMR's decision was illegal under Sanders, plaintiff has not alleged sufficient facts to establish an adequate nexus between the 1971 OER and his subsequent discharge. Assuming arguendo that the 1971 OER or the non-

rated period from March 7 to July 11, 1971 was in error, plaintiff has not alleged sufficient facts showing that the error(s) substantially affected the decision of the Regular Army Selection Board to not promote plaintiff. See Hary v. United States, 223 Ct. Cl.10, 17, 618 F. 2d 704 (1980). Rather, the record shows that plaintiff received nine OER's subsequent to the 1971 OER in a variety of positions over a span of six years during which time plaintiff was twice promoted from Second Lieutenant to Captain AUS. While the 1971 OER was not plaintiff's most outstanding OER, nor was the unrated period and time spent in the MTU necessarily helpful in plaintiff's military advancement, those facts alone do not appear to have substantially affected the Army's decision not to promote plaintiff.

CONCLUSION

In light of the foregoing reasons, the court concludes that plaintiff is not entitled to relief and that defendant is entitled to summary judgment as a matter of law. Having decided that defendant is entitled to judgment as a matter of law, we do not need to reach Defendant's Motion for Summary Judgment on the doctrine of laches.

Therefore, Defendant's Motion for Summary Judgment is granted and Plaintiff's Cross-Motion for Summary Judgment is denied. The complaint is to be dismissed.

IT IS SO ORDERED.

IN THE UNITED STATES COURT OF CLAIMS

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| GEORGE JOSEPH WEIDE, JR., Plaintiff, | ) | |
| v. | ) | No.-698-81C- 354-82C |
| THE UNITED STATES, Defendant. | ) | |

PETITION OF PLAINTIFF

1. A previous petition of the plaintiff was dismissed upon motion of the defendant by an order of the Court entered April 9, 1982, without prejudice to plaintiff's filing a new petition in compliance with Rule 35, setting out clearly and concisely plaintiff's claim, the basis for jurisdiction in the Court, and a demand for relief in accordance with plaintiff's claim and jurisdictional basis. This petition is filed in compliance with that order. [*]

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[*] [Note 5, Opinion Judge Tidwell, 4 Cl. Ct. 432, 434, Appendix, Page 23a, supra. The original petition, Docket No. 698-81C, was filed December 2, 1981, rather than November 2, as stated by Judge Tidwell. During oral argument on May 26, 1983, on a defense motion to dismiss No. 354-82C (denied), Chief Judge Kozinski held up the petition in No. 698-81C, and said, "I'll never know why they dismissed this!"]

2. Plaintiff invokes the jurisdiction of the Court in that he has been denied pay and allowances attributable to his grade of Captain, U. S. Army, Signal Corps Branch, 215-54-9428, since February 1, 1978, contrary to the Constitution and statutes of the United States, and claims entitlement to such pay and allowances under 37 U. S. Code section 204. Plaintiff asks that in addition to awarding him the money due him (subject to computation), the Court direct that plaintiff be restored to his office and that his military record be appropriately corrected, in accordance with the authority given the Court by the Tucker Act, as amended, Title 28, U. S. Code, Section 1491.

A. Statement of Facts

3. Plaintiff is 33 years of age, a citizen of the United States, born October 29, 1948, in the District of Columbia. He was tendered an appointment by the President of the United States as a Second Lieutenant, U. S. Army, and on June 3, 1970, accepted such appointment and

executed oath of office. He was at that time twenty-one years of age, and met all other qualifications prescribed by Section 3285 of Title 10, U. S. Code, which was in effect at the time. Section 3063 of Title 10, U. S. Code, provides that the Secretary of the Army may assign members of the Army to its basic branches. The basic branches are (1) Infantry; (2) Armor; (3) Artillery; (4) Corps of Engineers; (5) Signal Corps; (6) Adjutant General's Corps; (7) Quartermaster Corps; (8) Finance Corps; (9) Ordnance Corps; (10) Chemical Corps; (11) Transportation Corps; (12) Military Police Corps; and (13) such other basic branches as the Secretary considers necessary. Under the authority of Section 3063, the Secretary of the Army assigned plaintiff to the fifth of the basic branches specified in that statute, i. e., the Signal Corps. Subsection 3283(a) of Title 10, U. S. Code, provides that appointments in commissioned grades in the Regular Army shall be made without specification of branch, and subsection (b) provides that officers so appointed may be transferred and reassigned

by the Secretary of the Army to other branches "according to their professional qualifications and the needs of the Army." Both provisions are made subject to exceptions which are not applicable to the particular situation of the plaintiff, but the existence of which necessarily imply a legislative intent that the transfer and reassignment function could be exercised only by a responsible central authority under the supervision of the Secretary of the Army to assure (a) that any such action in a particular case satisfies the statutory conditions of professional qualifications and needs of the service, and (b) that a particular proposed transfer or reassignment does not fall within one of the statutory exceptions.

4. Plaintiff completed all prexcribed training, and was assigned as a Second Lieutenant, Signal Corps Branch, to the Second Battalion (Mechanized), Tenth Infantry Division (hereinafter 2/10), one of several units under the Fourth Infantry Division (Mechanized) at Fort Carson Colorado, where he reported and performed duty,

beginning in September, 1970. [*] Plaintiff was assigned as Communications Officer of the Battalion -- a duty appropriate to his grade and assigned Branch -- and at that point, for practical purposes, there began the compilation of his "military record", i. e., substantive duty assignments and evaluation of performance in those assignments, recorded in periodically submitted Officer Evaluation Reports (OERs), universally recognized as being "the single most important documents in an officer's re-ords", Sanders v. United States, 219 Ct. Cl. 285, 310, 594 F. 2d 804, 818.

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[*] [References, both by Judge Tidwell, 17a, supra, and Judge Kashiwa, 8a, supra, to the Tenth Infantry, and Weide's assignment to the Tenth Infantry, are inaccurate and misleading. Tenth Infantry (Division) reflects a historical association only of the Second Battalion, which is the command unit here in question. That Battalion, during all here relevant times, was one of sixty-some command units under the Fourth Infantry Division (Mechanized) at Fort Carson, Colorado. The Marksmanship Training Unit (MTU) (17a-18a) was another unit under the Fourth Infantry Division, as was also the First Battalion of the 29th Field Artillery Division, to which Weide was reassigned on July 11-12, 1971.]

5. The provision of Army Regulations in effect at the time, which governed assignments, details, and transfers of all Army personnel, was Army Regulations (AR) No. 614-6, of 8 January 1963, providing, in pertinent excerpt:

> 1. Purpose. These regulations establish the conditions under which military personnel will be reassigned between commands or units of the Army, establish the procedures to be followed in processing requests for reassignment. . .of Army personnel both as individuals and as members of units. (Underscoring for emphasis supplied)
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> * * *
>
> 3. Definitions. . .
>
> c. . . Subject to policies outlined herein. . . commanders are authorized to effect changes of assignment. . . of military personnel between elements of their commands. . .
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> * * *
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> 6. . . officers may be assigned on PCS [permanent change of station] within conus ]Continental United States]. . . However, reassignments under this authority will not be directed without advance approval (branch clearance) of Headquarters, Department of the Army. . . Requests for branch clearance will include the information requested by paragraph 19a (1) through (4). . .
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> * * *
>
> 19. . . Requests will contain the following information:
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> * * *
>
> (4) Full justification for the proposed move and whether a replacement will be required if the request is

approved. The justification will include information as to the availability for reassignment of other similarly qualified personnel for whom exceptions to policy would not be necessary.

6. After plaintiff had served for a little more than two months as Communications Officer of the 2/10, he was reassigned by the Commanding General of the Fourth Infantry Division to the Marksmanship Training Unit (MTU) under that Division. A replacement was required as Communications Officer of the 2/10, and another officer of the Signal Corps Branch was ordered to that position by the Commanding General. There was no dissatisfaction with plaintiff's performance indicated by any person in authority in the 2/10, and plaintiff was in fact given a very high OER for the period he had served in the 2/10. That OER did not mention the circumstances prompting the reassignment of the plaintiff, and indicated the assignment of a new "rater" (immediate superior) of the plaintiff as the occasion for submitting an OER after so short a period of service, without revealing that a PCS (permanent change of station) was being

effected between two units of the Fourth Infantry Division at Fort Carson. Plaintiff dit not perform, and was not expected to perform, in the Marksmanship Training Unit, any of the duties usually assigned to an officer of the Signal Corps Branch, but instead performed exclusively duties associated with the Infantry Branch, i. e., rifle marksmanship competition, firing rifles and servicing targets, scoring other marksmen.

7. Prior to his assignment, Plaintiff questioned the Battalion Commander of the 2/10, Lieutenant Colonel George J. Pierce, as to the compatibility of the change of station with his Signal Corps Branch career status, and was told that it was the opinion of the Battalion Commander that at so early a stage in plaintiff's career, the reassignment should not adversely affect the plaintiff. Plaintiff was not at the time aware of the provisions of AR 614-6 quoted above. Nothing was said to plaintiff by any person as to any necessity for "advance approval (branch clearance) of Headquarters, Department of the Army"; nor as to any data being submitted

to the Department of the Army concerning the proposed move. No "justification" for the proposed move in terms of interests of the Signal Corps Branch, of the Army as a whole, or of plaintiff individually as a would-be lifetime career officer, was ever mentioned. The only statement that plaintiff recollects hearing in the nature of justification for the transfer is one made by the Battalion Commander to the effect that the 2/10 would receive extra "points" in Fourth Infantry Division inter-unit competition by reason of plaintiff's being selected (by reason of rifle marksmanship prowess) for assignment to the Marksmanship Training Unit, and by being actually reassigned following such selection. Plaintiff's official record has at no time contained any indication that the Signal Corps Branch office in Headquarters, Department of the Army, was in any way contemporaneously advised that plaintiff was being considered for reassignment, was being reassigned, or had been reassigned to Infantry Branch duties in the Marksmanship Training Unit. In fact, as is here-

inbelow set forth, for some three years his record was affirmatively falsified and did not reveal that he had been reassigned from the Battalion at all, but implied that he had been removed from a Signal Corps Branch position and assigned duties in the Battalion in no way appropriate to that Branch, with no indication whatsoever as to the reason. Plaintiff believes, and therefore alleges, that the Fourth Infantry Division (Mechanized), a command authorized to issue orders under AR 614-6 of 8 January 1963, failed to comply with the requirements of that regulation; did not obtain "branch clearance" (viz., Signal Corps Branch approval) of his reassignment to the Marksmanship Training Unit; and that had such branch clearance been sought, as required by the explicit terms of the governing regulation as well as by sound personnel management principles, Signal Corps Branch approval would not have been given, at the very least without counselling the plaintiff and insisting upon his being transferred to another basic branch, and his undergoing the further

training required to qualify him for the branch to which transferred.

8. Plaintiff served in the Marksmanship Training Unit from December 1, 1970, through March 6, 1971, a period of 97 days. Although performing no duty appropriate to the Signal Corps Branch while in that Unit, plaintiff did not institute action looking toward a transfer to another basic branch, and no suggestion was ever made to him that he should do so. Plaintiff was successful in the MTU in that he was assigned to a Fort Carson rifle marksmanship team and was given orders to permit his traveling to participate in a forthcoming match. Prior to his beginning such travel, however, a 60% reduction was ordered in MTU personnel, which required that plaintiff be reassigned from that Unit. Plaintiff sought reassignment to a Signal Corps position in another unit of the Fourth Infantry Division. He was told by a Division personnel officer that there was then no Signal Corps position open in any of the some sixty units of the Division, but that he would be given a choice

among such positions as might open in the future. Pending such time as a Signal Corps position might become available, plaintiff was reassigned by the Commanding General of the Fourth Infantry Division from the MTU to the 2/10, to which he had been previously assigned as Communications Officer and in which he was favorably regarded by the principal Battalion officers.

9. Upon returning to the 2/10, plaintiff was told that there was then no place in which he could be utilized as a Signal Corps officer, nor was there at the moment any position in the S-3 (Operations) section of the Battalion (in which he had served as Communications Officer prior to his reassignment to the MTU) to which plaintiff could be assigned. Plaintiff was temporarily given a desk outside the office of the Battalion S-1 (adjutant, personnel officer). The S-1 was Captain Stephen M. Voris, who had been assigned to the 2/10 in either December, 1970, or January, 1971, after returning from Vietnam, and who had served in the S-2 (Intelligence) section until a few days prior to plain-

tiff's reporting to the 2/10 upon reassignment, i. e., March 7, 1971. In latter March or during the first days of April, 1971, plaintiff was told by the Battalion Commander that plaintiff was being assigned as VOLAR (Volunteer Army) officer of the Battalion, under the S-3, a Major Peter R. Park, who had assumed the S-3 section a few days before plaintiff had been reassigned the previous November from the position of Communications Officer in the S-3 section of the Battalion. Plaintiff moved from the desk he had occupied in the Headquarters Building, outside the S-1 office, to a building some distance away which contained the S-3 offices, no later than April 10, 1971. Plaintiff actively performed duties as the first incumbent in the newly established position of VOLAR Officer, being in charge of funds for the making of incentive awards to personnel demonstrating unusual progress in their training, working with the S-4 (supply, logistics) to the end of improving the habitability of enlisted quarters, and attending periodic meetings attended by VOLAR officers of various Fourth Infantry Divi-

sion Units, at which accomplishments were reported and instructions received, from about 10 April until 11 July 1971. In early July, plaintiff was advised by the Fourth Infantry Division personnel office that two Signal Corps positions had become available, of which he would be given first choice. Plaintiff chose the position of Communication Officer of the First Battalion of the 29th Field Artillery Division, and was reassigned from the 2/10 to the 1/29FA. As of June 25, 1971, Major Peter R. Park became Executive Officer of the 2/10, relieving Major James H. Martin, who left the area; then Captain Peter S. Sowa, who had been Commanding Officer of the Headquarters Company, relieved Major Park as S-3. When plaintiff was reassigned from the 2/10 on July 11th, he was warmly congratulated by Captain Sowa, Major Park, and Lieutenant Colonel Pierce upon the performance he had rendered as VOLAR Officer.

10. Plaintiff did not have an opportunity to review his military record until early 1972, when he was on leave at his parental home in the

Washington, D. C. area. Upon then reviewing his record in the Military Personnel Center in Alexandria, Virginia, the following errors were apparent:

a. There was no record indication of his reassignment as of November 30, 1970, from the 2/10 to the Marksmanship Training Unit.
b. There was no record indication of his reassignment as of March 6, 1971, from the MTU to the 2/10.
c. An OER was in his record, submitted by Captain Stephen M. Voris as Rater, indicating that plaintiff had served in the 2/10 in the position of "Acting Assistant S-1" from December 1, 1970, until July 12, 1971.
d. Qualitative performance evaluations in the purported December-July OER were noticeably inferior to those on the genuine September-December OER, submitted upon plaintiff's performance as Communications Officer through November 30, 1970.
e. In contrast to warmly enthusiastic narrative comment by both the Rater and Indorser on the September-December report, the spurious December-July OER contained substantive comment of the purported Rater only, stating:

> Lieutenant Weide performed his duties in an extraordinary manner. He strived to do his best and exhibited a strong desire to

> accomplish a given mission. He was somewhat hindered in fully accomplishing his job due to a lack of experience and working out of his primary MOS. He was reassigned to a Communications Officer position for that reason.
>
> [MOS = Military Occupational Specialty, in the case of plaintiff, 25, Signal Corpa]

11. Inasmuch as it was apparent that Captain Voris, in signing and submitting the purported 1 December 1970 - 12 July 1971 OER, had made several false official statements, in violation of 10 U.S.C. 907, plaintiff, as an officer subject to the Uniform Code of Military Justice, Chapter 47 of Title 10, U. S. Code, was required by 10 U.S.C. 831, prior to interrogating or requesting any statement from Captain Voris, (a) to inform Captain Voris of the nature of the offense(s) of which he was suspected, and to advise him (b) that he did not have to make any statement concerning the offense(w), and (c) that any statement he did make might be used against him in a trial by court-martial. Noncompliance by plaintiff with 10 U.S.C. 831 could have subjected plaintiff to court-martial prosecution for violating 10 U.S.C. 898.

12. At the time plaintiff discovered the errors in his record, in early 1972, he was still at Fort Carson with the 1/29 FA, but was aware that he was to receive orders to duty overseas in the very near future. He had maintained no contact with officers of the 2/10 since July, 1971, and considered that his raising the matter at Fort Carson, with included involvement of the Commanding General of the Fourth Infantry Division as the common superior, would at best not enhance his status as a First Lieutenant. Within a month after returning to Fort Carson from leave, plaintiff received orders to duty in a Signal Corps position in Vietnam, but such orders were superseded some ten days later by orders assigning him as Radio Officer of a Hawk Missile Battalion in the Republic of Korea. Plaintiff was transferred from the 1/29 FA on 21 April 1972, given a high level OER, and reported to the Missile Battalion in Korea on 2 June. He remained in Korea for a little over one year, receiving three excellent OERs on his performance, and returned to the United States in mid-

1973, being assigned to the First Signal Group, Ninth Infantry Division, Fort Lewis, Washington.

13. While serving in Korea, plaintiff had initiated some correspondence to officers other than Captain Voris who had served in the 2/10 during either or both of plaintiff's assignments to that Battalion in 1970 and 1971. Under date of 18 September 1973, plaintiff submitted an appeal of the spurious OER submitted for the 1 December 1970 - 12 July 1971 period, which appeal was made in accordance with paragraph 4-2e of Army Regulations AR 623-105 of 20 January 1972. Included with papers submitted by plaintiff with his appeal were a detailed statement of his duty assignments, September 10, 1970, through July 12, 1971; statements by two officers of the Marksmanship Training Unit, Fourth Infantry Division, attesting plaintiff's assignment to that Unit from 23 November 1970 through 6 March 1971, one of which officers stated that he had submitted an OER rating plaintiff for his service while he was assigned to the MTU; and statements by both the Battalion Commander at

the time and the Executive Officer of the Battalion. Under date of 20 November 1973, the Military Personnel Center acted upon plaintiff's appeal. Although reoognizing, tacitly, the false official statements made by Captain Voris relative to his having had plaintiff under his supervision (a) since 1 December 1970, (b) with his report being based upon "daily contact", (c) in the capacity of Adjutant (S-1) of the Second Battalion, Tenth Infantry Division throughout that period, the Military Personnel Center did not consult personnel records of officers other than plaintiff and other personnel records, e. g., personnel diaries, which were readily available to officers stationed in the Center but could not be made available to the plaintiff, in an effort to establish the verity vel non of other entries in the OER appealed from as well as in the surrounding record. Plaintiff's record does not indicate that officers of the Signal Corps Branch commented upon the noncompliance with provisions of statutes of the United States and regulations of the Department of the Army in implementation thereof regarding

assignments of officers appointed in the Regular Army to basic branches and reassignments to be made thereafter only with "branch clearance" in Headquarters, Department of the Army. The Military Personnel Center limited the relief granted to plaintiff with respect to the spurious OER to taping small pieces of paper to the OER indicating a 7 March 1971 reporting date in lieu of 1 December 1970, and indicating "115" as the number of duty days covered by the OER in lieu of the previous false entry of "211." A form "Memorandum for Record" was inserted in plaintiff's performance- file, indicating 1 December 1970 to 6 March 1971 as a "Not Rated Period," and stating "Efficiency report received but voided per: The above period was erroneously included in another report by an improper rating officer. Since the proper rating officer is no longer on active military duty, action will not be taken to obtain a delayed report for the above period." The sole indication as to what plaintiff may have done and how well or ill he did it is in the statement, "Member of Marksmanship Training Unit,

4th Inf Div (M), MTU, Fort Carson, CO." The grade of plaintiff at the time is erroneously indicated in the memorandum as "1LT SC," whereas plaintiff was in fact at the time a Second Lieutenant. Although reference to personnel diaries readily available to personnel attached to the Military Personnel Center would have revealed (a) that plaintiff had been under any supervision by Captain Voris for some thirty days at the most, and (b) that plaintiff had been under the continuous supervision of Major Park, as S-3, for at least a period of seventy days from April to 25 June 1971 (a period of sixty days such supervision being required under applicable regulations to permit submission of a substantive OER, and submission of a substantive OER being mandated from an officer who has had another under his supervision for over sixty continuous days), officers of the Military Personnel Center refused to delete marks or comments assigned by Captain Voris on the challenged OER, stating "Insufficient evidence has been presented to show that CPT Stephen M. Voris was not your proper rating

officer for the period 7 March 1971 to 11 July 1971."

14. Plaintiff was not satisfied with the action taken by the Military Personnel Center, and while on leave from Fort Lewis, Washington, in the Washington, D. C., area in early 1974, plaintiff consulted a Career Counsellor in the Signal Corps Branch at Headquarters of the Department of the Army. The Career Counsellor did not point out to plaintiff that his reassignment from the 2/10 to the MTU had been effected without "branch clearance," hence not in compliance with the governing statute and implementing regulations. The Counsellor recognized the inadequacy of the Military Personnel Center action on plaintiff's appeal, but noted that all plaintiff's OERs since 12 July 1971 had been very high level; indicated that plaintiff's promotion to the grade of Captain (temporary) in June, 1974, was virtually assured; and expressed an opinion that if plaintiff continued to receive reports of the same high quality, the false second report from the 2/10 would be ignored.

15. Plaintiff did not take further action at the time. He was given a temporary promotion to the grade of Captain in June, 1974. OERs received at Fort Lewis were of even higher quality than those seen by the Career Counsellor, and since they were submitted by senior Signal Corps officers respecting service in a large Signal unit, should have received even greater attention and credence from reviewing officers and boards. Notwithstanding these facts, a letter under date of 17 March 1975 from the Military Personnel Center notified plaintiff that he was one of 2700 officers being considered for elimination from active service to enable the Army to effect a 2200 reduction in officer personnel strength. Among the factors which the Military Personnel Center letter stated as having been considered in thus reverse selecting plaintiff along with 2699 other officers were, "The presence of any derogatory information in the records," and "Performance reflected by evaluation reports." Plaintiff was offered an opportunity to submit for the consideration of the Army Active Duty

Board written material to be considered when reviewing plaintiff's official file, and under date of 11 April 1975 did submit a statement. Even though the spurious second OER from the 2/10 constituted the sole explicit information in plaintiff's record which might have been considered "derogatory" as well as being the sole evaluation report indicating performance sufficiently inferior to suggest plaintiff's being among the Army's 2700 worst officers, plaintiff in his statement did not address these head-on. He instead set forth in his statement the circumstances in his personal background which provided an unavoidable implication as to why plaintiff has been reassigned from the 2/10 to the MTU after only two month's service as Battalion Communications Officer. Specifically, plaintiff was among the best rifle marksmen in civilian life before entering the service, and had demonstrated his ability to lead and train others in developing a championship team in the 2/10. In the absence of such explanation, plaintiff's record is susceptible to an inference that plain-

tiff committed some egregious offense or blunder as a neophyte communications officer, and was promptly packed off to nonsensitive non-Signal Corps assignments either or both out of charity toward him and inability to adduce sufficient usable evidence to establish what he was suspected of having done. By letter dated 30 June 1975 from the Military Personnel Center, plaintiff was advised that the Board to which his records were referred had selected him for retention in active service. Plaintiff was further advised that all papers relating to the board consideration had been removed from his record. This was not an unmixed blessing, as the removal deprived any subsequent reviewer of the explanation of why plaintiff had been reassigned to the MTU, which at the same time tended to dispel any suspicion of a highly base reason underlying the reassignment.

16. In 1976, a board convened to recommend officers to the regular grade of captain, pursuant to section 3299 of Title 10, U. S. Code, which was in effect at the time, failed to sel-

ect plaintiff for such promotion. Plaintiff had been serving in the temporary grade of captain since June, 1974, with OERs showing consistent improvement to an outstanding level. No increase in pay or other emolument would have been involved had he been selected, and no reduction in grade or pay attended his nonselection. The plaintiff submits that any scoring of his performance record which did not include the illegally submitted second OER from the 2/10 would have placed him well above the lowest score of any record relating to an officer who was selected by that Board. In 1977, a second board failed to select plaintiff for permanent promotion to the grade of Captain, Regular Army, and his discharge was effected on February 1, 1978, under the provisions of section 3303 of Title 10, U. S. Code, as they then existed.

17. In December, 1977, and in January, 1978, plaintiff made applications to the Secretary of the Army, pursuant to section 1552 of Title 10, U. S. Code, requesting that his nonselection for promotion to the grade of Captain, Regular Army,

be set aside and that he be retained in the Army pending correction of his record and consideration by a further Board for promotion to the grade of Captain, Regular Army, upon the basis of his corrected record. The case of plaintiff was presented from the outset as one involving error, not merely injustice in a moral or ethical sense, under the distinction drawn by Judge Nichols concurring in Sanders v. United States, 219 Ct. Cl. 285, 315-322, 594 F. 2d 804, 821-824 (1979). In providing, in Section 207 of the Legislative Reorganization Act of 1946, that the power to correct military or naval records theretofore exclusively exercised by the Congress through enacting private relief legislation should thenceforth be exercised by military department Secretaries, acting through civilian boards, the Congress clearly contemplated two distinct types of situations in which record correction would be sought. Such Secretary was authorized to correct a military or naval record under the cognizance of his department when, in his judgment, such action was necessary (a) to correct an error or (b) to remove an injustice.

As to the situation involving asserted injustice absent any claimed legal error, then injustice, like beauty, lies so much within the senses of the beholder that it becomes a near impossibility to establish standards for reviewing Secretarial action denying relief. In such cases it is conceivable that a Secretary could indicate to the boards through whom he is required to act, and the board members to the staffs, classes of cases of asserted injustice which it is desired to consider in some depth as opposed to ones that can be disposed of summarily and relief denied at the staff board examiner level. In the case of a claimed legal error, however, e. g., a failure to comply with a statutory standard, observe a statutory prohibition, or follow a statutory or regulatorily established procedure, then the matter departs from the purely discretionary area and enters the realm of Constitutionally mandated due process of law. Determinations in these cases <u>are</u> reviewable by Courts of the United States, and such review cannot be thwarted by ignoring the legal issues presented and disposing

of the case at Examiner or Board level with a stereotyped declaration that the applicant has "failed to submit sufficient relevant evidence to demonstrate the existence of probable materiam error or injustice to warrant a formal hearing." Applications presenting assertions of legal error as to which the resulting material prejudice is apparent must be presented to the Record Correction Board and must be presented by the Board to the Secretary for resolution of the assertion of legal error, and failure so to present them is in and of itself arbitrary and capricious action. A hearing in such cases may be desirable to any extent that there may be a question as to the credibility of the applicant in one or more respects, or wherein there are errors of lack of detail or clarity in the presentation as to which further development is indicated, but it is the written presentation that is of prime importance, and where the applicant is represented by counsel, a conference between members of the Board and counsel may often be of greater assistance than a personal

hearing of the applicant. In short, the basic statute has from the outset created a dichotomy between cases involving asserted legal error and the far more numerous cases in which there is no serious contention that what was done was legally wrong and what the applicants are essentially seeking is a rebalancing of equities and a larger measure of compassion. That procedure carries through to the procedure which must be followed. As Judge Nichols points out in Sanders, supra, intrusion by Courts into disposition by military departments of purely moral claims raises jurisdictional issues and invites reversals. But it is, on the other hand, a usurpation of the judicial power for a military department to ignore legal issues which an application presents (whether or not labeled as such with statute and case citations), and dispose of the application as though it presented moral or compassionate considerations only. In the presence of a challenge to an administrative system, the burden is upon the administrators to demonstrate compliance with the statutes which both

authorize and regulate their official actions. They cannot avoid such a demonstration by declaring that the applicant has failed to present sufficient evidence [i. e., sufficient to satisfy them] of noncompliance. In requiring that boards through which Secretaries act to exercise their record correction authority be composed of civilians, the Congress impliedly recognized the reluctance of military officers to recognize the existence of any error in a system of military administration. Those boards cannot abdicate to military officers either the development or the resolution of assertions of legal error which are apparent in applications pursuant to 10 U.S.C. 1552 which are made through them.

18. The plaintiff's December, 1977, and January, 1978, applications pursuant to 10 U.S.C. 1552 did present legal issues as hereinablve indicated. They indicated that consideration of plaintiff for promotion to the grade of Captain, Regular Army, had not been made on the basis of a fair and equitable record, and requested that the second non-selection of plaintiff be set aside; that he be

retained in active service; that his record be corrected; and that he be again considered for such promotion by a Board on the basis of his corrected record. The Army had in existence at the time machinery for such consideration by specially constituted boards, as is indicated by Doyle v. United States, 200 Ct. Cl. 285, 599 F. 2d 984 (1979), cert. denied, 446 U. S. 982 (1980). These applications were denied, plaintiff was discharged on 1 February 1978 from the Regular Army; was appointed a Captain, U. S. Army Reserve, Signal Corps Branch; but was not ordered to active duty. Plaintiff accordingly has been illegally denied pay and allowances attributable to his grade of Captain under Title 37, U. S. Code, section 204.

19. Beginning on 20 June 1978, plaintiff has made repeated applications to the Secretary of the Army for correction of his record pursuant to 10 U.S.C. 1552. Such applications have been denied without according plaintiff any opportunity for hearing before the Army Board for Correction of Military Records (the civilian board through which the Secretary is required to act under the

terms of 10 U.S.C. 1552); and without presenting to the Secretary of the Army any brief or summary setting forth the essence of plaintiff's assertions of error and the position taken by military personnel administrators as to each such assertion. Plaintiff's applications have been denied with 3-4 page documents styled "Memorandum of Consideration." Such documents have not undertaken to treat in detail the assertions made by the plaintiff; to analyze documentary evidence submitted in support thereof; to analyze matter submitted by military personnel administrators regarding plaintiff's assertions; and to indicate specific assertions by plaintiff which are believed to be either correct or in error on the law and the facts, with reasons for that belief. Instead, each such Memorandum deals only superficially with a selected portion of plaintiff's assertions; quotes without analysis terse comment of military personnel administrators; and ends with the conclusion that plaintiff has "failed to submit sufficient relevant evidence to demonstrate the existence of probable material

error or injustice to warrant a formal hearing." Plaintiff was given no opportunity to review any such Memorandum of Consideration in advance of its being submitted to the Board and to submit any form of suggestion for amendment or deletion to the Examiner or countering brief for consideration by the Board. Such a Memorandum of Consideration dated 2 September 1981 and transmitted to plaintiff by a letter from the Board Staff, dated 16 September, represented the end product of over three years of repeated efforts by the plaintiff to obtain a responsible determination of his claim. The initial detailed submission of 20 June 1978, which included original signed documents supporting plaintiff's position, was lost and has never been retrieved by the Board staff. There is strong reason to doubt that it was ever in fact submitted to the Board. A copy was furnished by plaintiff in June, 1981, such being the first time that Army personnel administrators were asked to advise the Board of their position concerning a complete and detailed submission by the plaintiff. Upon

receiving the 2 September 1981 Memorandum which disposed of the final effort by the plaintiff, the initial petition of plaintiff was filed in this ourt on 2 December 1981.

20. One specific illustration only will be given of the slip-shod administration which has characterized the treatment by the Department of the Army of plaintiff's 10 U.S.C. 1552 applications from the outset. One of the principal, although not the sole, assertions of error by the plaintiff concerned the OER submitted by Captain Stephen M. Voris as rater, originally for the 1 December 1970 - 12 July 1971 period, but altered in 1973 to limit the period to that of plaintiff's second assignment to the 2/10, i. e., 7 March 1971 - 12 July 1971. (Paragraph 10, pages 8-9, above [pages 41a-43a of this appendix]) Plaintiff had consistently asserted since 1973 that Captain Voris was not a person eligible under extant Army Regulations to submit an OER "rating" plaintiff, and was affirmatively disqualified to act as rater of plaintiff since plaintiff had at no time been under the supervision of Captain

Voris for a period of as long as sixty days. Plaintiff asserted that Major Peter R. Park, the Battalion S-3, under whose supervision plaintiff had served full time as VOLAR Officer, 10 April - 25 June 1971, was the only eligible rater of plaintiff under well-established regulations and practice of long standing.* The actual content of regulations in this regard was

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* Evensen v. United States, Ct. Cl. No. 265-79C, decided July 1, 1981, [228 Ct. Cl. 207, 216] 654 F. 2d 68, slip opinion bottom page 2, 654 F. wd at 70. The Army Correction Board recommended removal by the Secretary of the Army of an OER submitted by a rater ineligible under the same provision of Army Regulations, and the error involved was denominated by the Court as "not trivial, insubstantial, or technical," slip opinion at 9, 654 F. 2d at 74 [228 Ct. Cl. at 216]. The action of the Army Board in Evensen was in latter September, 1977, just three months before plaintiff's initial application in December, 1977, urging the identical error with respect to the OER submitted by Captain Voris.

was first submitted in an administrati-e comment of the Chief, Officer Personnel Records, dated 10 August 1981, stating, with respect to the challenged Voris OER:

> . . .The report was submitted in accordance with the provisions of Paragraph 2-5(1), C1, AR 623-105 dated 10 Sep 70, which read in part "In some cases the immediate superior may not be an officer of the unit to which the rated officer is assigned but he may be the supervisor for the rated officer's principal duty."

The quotation omitted the immediately preceding sentence, i. e.:

> A report will be prepared by the immediate superior in the rated officer's chain of command or staff who is in the best position to have personal or official knowledge of the duty performance of the r-ated officer. In some cases the immediate. . .

The full context of the regulation supports the position of the plaintiff, and the sentence quoted out of context by the Chief, Officer Personnel Records, actually says that even had plaintiff remained nominally assigned to the S-1 Section under Captain Voris, Major Park would still be the proper rater of plaintiff, in that Major Park, though not an officer of the S-1 unit to which plaintiff was (arguendo) assigned, was the

immediate superior in rank to plaintiff who was "in the best position to have personal or official knowledge of the duty performance" of the plaintiff. It is striking that a responsible chief of officer personnel records administration would make, and the Army Board for Correction of Military Records would accept and base a decision adverse to an applicant on, so egregious a misstatement concerning the regulations he administers, just one month after the Court handed down its decision in Evensen, the substance of which was widely published.

21. Plaintiff submits that had his record of service been correct with respect to the kind and quality of performance by him during the period from November 20, 1970, until July 12, 1971, he would have been selected in 1976 for promotion to the grade of Captain, Regular Army. In 1973, plaintiff officially protested the errors in his record to military personnel administrators in Headquarters, Department of the Army, who were authori-zed and facilitated fully to assess the errors present. To any extent that

such military personnel administrators considered that they themselves might be lacking in statutory authority to effect a full correction of such errors, they could have advised plaintiff of his right to apply to the Secretary of the Army pursuant to 10 U.S.C. 1552 for such necessary further correction, and the extent to which they would support such an application by him. Those administrators, however, although swallowing the camel by tacitly recognizing that Captain Voris had lied in submitting an official report stating that he had plaintiff under his daily supervision in the S-1 Section of the 2/10 from 1 December 1970 through 6 March 1971, strained at the gnat of accepting also plaintiff's documented indication that Captain Voris had misrepresented himself as having had plaintiff under his supervision in the S-1 section of the 2/10 from April 10, 1971, through July 11, 1971. Further, those administrators effected only a grudging minimal correction of plaintiff's record in 1973 by recognizing that he had been reassigned to the Marksmanship Training Unit of the Fourth

Infantry Division from December 1, 1970, through March 6, 1971, but failed to state that such had been an unauthorised reassignment effected without branch clearance, and failed to place in plaintiff's record any matter tending to answer the question which would arise in the mind of any experienced reviewer, i. e., why was a young Signal Corps Branch officer, who reportedly did such a fine job during his first two months of performing communications duties, suddenly reassigned to completely unrelated Infantry Branch duties? The immediate further reflection of such a reviewer would be that whatever the reason may have been, the event was sufficiently suspicious to suggest passing over that record and returning to it for further consideration only if there were still vacancies to be filled and no other Signal Corps officers available for consideration to fill them. The suspicion of a reviewer would be strengthened by the fact that plaintiff, after reassignment from the MTU (likewise not explained by the record), was assigned to another unit for over- four months where he performed no duty in

any way related to his Signal Corps branch status, although such other station was well known to be of a type which had Signal Corps personnel attached, full-time; yet in such unrelated duties was indicated to have performed with such minimal satisfaction that it was found necessary to reassign him to Signal Corps Branch duties once again. (Uncomplimentary implications as to Signal Corps Branch officers and duties in general would hardly have escaped a reviewer of that Corps, and would have further prejudiced the reviewer against plaintiff as one who had sullied the general reputation of the Signal Corps and its officers.)

22. Rather than considering the broad overall picture as to what had happened in the case of plaintiff -- as would have befitted a Board comprised of high-level civilian officers through whom the Secretary of the Army was required by statute to act in exercising a power to accomplish what the Congress of the United States could accomplish by enacting private relief legislation with the approval of the President of the United States -- the Army Board for Correction

of Military Records refused upon repeated applications by the plaintiff to go beyond referring matter submitted by the plaintiff to military personnel administrators and uncritically accepting their unsupported general assurances that their officers had acted properly in the past and plaintiff was entitled to nothing further. It is very questionable on the record to what extent the substantive assertions advanced by the plaintiff were actually brought to the attention of the members of the Correction Board, to say nothing of their being brought to the attention of the Secretary of the Army who is alone empowered under 10 U.S.C. 1552 to correct an Army military record, and to whose judgmental determination of necessity the statute leaves the decision as to whether a correction shall be made even where error is found to exist.

23. Under the circumstances of this case, the Secretary of the Army is responsible for the arbitrary and capricious action of officers of the Department of the Army who have not administered Section 1552 of Title 10, U. S. Code, in accord-

ance with either its letter or the spirit and purpose of its enactment in 1946 and subsequent amendatory enactments. The plaintiff has repeatedly made applications pursuant to that stuatute which have demonstrated legal error of record which has been materially prejudicial to him, and no such demonstration has been denied or countered with respect to the broader issues presented. As the officer responsible for administration within the Department of the Army of Section 1552 of Title 10, U. S. Code, the Secretary of the Army is chargeable in the case of plaintiff with having acted arbitrarily and capriciously through failure to assure that procedures prescribed and followed would require prompt consideration and resolution of applications under that statute which presented substantive assertions of legal error, and referral to the Secretary for final decision of the issues raised in such cases. The case of plaintiff being one in which legal error, as distinguished from injustice based solely upon moral or ethical invidiousness, has been consistently asserted as the basis for his applying for

action under Section 1552, this Court has jurisdiction to review directly the assertions of legal error made by the plaintiff, to consider responses thereto obtained from the Department of the Army, and to render judgment thereupon. The plaintiff has attempted unsuccessfully for over three and one-half years to obtain a substantive response from the Department of the Army to repeated applications under Section 1552, and over four years before making the first such application was unsuccessful in his attempt to obtain a full correction of the legal errors in his record upon administrative application. The plaintiff has fully exhausted all administrative avenues of relief which are potentially afforded to him by statutes and regulations.

24. The discharge of the plaintiff from the Regular Army on 1 February 1978, was void in that it resulted from two failures of selection for promotion to the grade of Captain, Regular Army, which failures of selection would not have occurred but for the existence of the unexplained legal errors of record hereinabove set forth,

precluding consideration of plaintiff on a "fair and equitable basis" as required by statute. Plaintiff has suffered prejudice in his current status as a Captain, U. S. Army Reserve, assigned to the Signal Corps Branch, as a result of the error in his record. Plaintiff applied and was selected for the Army Long Tour Management Program*, being assigned what he was assured was a high Order of Merit Number, 0113, and was told that an assignment was available for him at Fort Gordon, Georgia, which he indicated would be acceptable to him. In making his current application for the LTMP, plaintiff acted pursuant to an official announcement indicating that failure of selection for Regular Army promotion could be waived; had requested such a waiver; had been selected; and his selection was approved by the Secretary of the Army, all notwithstanding

---

* The Army Long Tour Management Program (LTMP) is a counterpart of the Navy TAR (Training and Administration, Reserve) program, which was before the Court of Claims in Buchanan v. United States (Ct. Cl. No. 130-75, decided April 2, 1980), ____ Ct. Cl. ____, 621 F. 2d 373. [223 Ct. Cl. 291]

his explicit indication in his application of having failed of selection for Regular Army promotion. On 19 February 1982, some two and one-half months after plaintiff had filed his initial petition in this Court, a telephone call by plaintiff to the Reserve Components Personnel Actions Center (RCPAC) in St. Louis, Missouri -- through which all of his LTMP papers had been processed, and from officers of which he had consistently received encouragement -- elicited curt statements from two different officers that plaintiff was ineligible by reason of his failures of selection for Regular Army promotion. Plaintiff's assertions of inconsistency between those and past responses to inquiries by him were answered with statements to the effect that officers at the Center had had a "learning experience." The effect of the legal errors in plaintiff's record and the failures of selection which resulted solely and exclusively therefrom, has been to characterize plaintiff's status and record of service as a Reserve officer as inferior to other Reserve Officers the level of

whose OERs relating to their Reserve service is below that of those received by plaintiff for substantially similar service.

B. Constitutional Provisions, Statutes, And Regulations Pertinent

25. Constitutional Provisions:

Amendment V to the Constitution of the United States.

26. Statutes (all references to 10 U.S.C are to the 1976 edition)

a. 10 U. S. Code, section 3285
b. 10 U. S. Code, section 3063
c. 10 U. S. Code, section 3283
d. 10 U. S. Code, section 3299
e. 10 U. S. Code, section 3303
f. 10 U. S. Code, section 3442(c)
g. 10 U. S. Code, section 1552
h. Defense Officer Personnel Management Act, Public Law 96-513, 96th Congress, appro-ed December 12, 1980, 94 Stat. 2835-2956, generally effective September 15, 1981.
(1) 10 U. S. C. 628 as added by DOPMA
(2) 10 U. S. C. 637(a) as a-ded by COPMA
i. 37 U. S. Code, section 204

27. Army Regulations (AR)

a. AR 614-6 of 8 January 1963
b. AR 623-105 of 20 January 1972
c. AR 623-105 of 16 September 1970
d. AR 623-105 of 1 April 1971
e. AR 623-105 of 6 March 1970

C. Demand For Judgment

28. Plaintiff asks the judgment of this

Court that:

a. His purported discharge from the Regular Army as of 1 February 1978 be declared void, and that plaintiff be awarded pay and allowances incident to the grade of a Captain of the Army serving under an appointment for temporary service, from 1 February 1978, less civilian earnings and pay and allowances received while serving on active duty as a Captain, U. S. Army Reserve, all subject to computation..

b. The Secretary of the Army be directed to place plaintiff on active duty as a Captain, U. S. Army Reserve, and to assign plaintiff to appropriate duty, pending the correction of plaintiff's military record.

c. The Secretary of the Army be directed to correct plaintiff's military record by:

(1) Removing from plaintiff's record the Memorandum of Non Rated Period relating to his service in the Marksmanship Training Unit (MTU) 4th Infantry Division, December, 1970 - March, 1971.

(2) Removing from plaintiff's record the 7 March - 11 July 1971 OER, submitted by Captain Stephen M. Voris as rater.

(3) Removing from plaintiff's record all papers relating to plaintiff's 1973 appeal of the 7 March - 11 July 1971 OER and to the disposition of that appeal.

(4) Placing in plaintiff's record a certificate that plaintiff, in latter November, 1970, was reassigned from a Signal Corps Position in the Second Battalion, Tenth Infantry Division, to the Marksmanship Training Unit of the Fourth Infantry Division; the reassignment was effected by direction of the Commanding General of the Fourth Infantry Division, without Signal Corps Branch clearance being obtained as required by regulations in effect at the time; Since the reassignment was not to be made with proper Branch clearance, and the duties to be performed in the Marksmanship Training Unit were not appropriate to an officer of the Signal Corps, the reassignment was not indicated on an OER submitted upon plaintiff at the time he left the 2/10; that plaintiff performed all duties assigned him in the MTU in an outstanding manner, competing against lifetime rifle marksmen; was chosen for membership on one of the Fort Carson rifle teams, and was ultimately reassigned from the MTU in early March, 1971, solely because a 60% reduction was ordered by higher authority in the personnel of the MTU.

(5) Placing in plaintiff's record a certificate that when, through no fault or deficiency on his part, it became necessary to reassign him from the MTU in March, 1971, there was no Signal Corps position in any of the units

under the Fourth Infantry Division to which plaintiff could be assigned. Plaintiff was therefore reassigned to the 2/10, from wchich he had been reassigned in November, with the assurance that he would be reassigned from the 2/10 to one of the first Signal Corps positions appropriate to his grade which should thereafter become available at any of the Fourth Infantry Division Units at Fort Carson. Plaintiff was made the first incumbent in the newly established position of VOLAR (Volunteer Army) Officer in the 2/10, under the S-3 of that Battalion, and performed in a superior manner establishing the pattern of operation of successors in that position, administering a cash incentive awards program, in cooperation with the S-4 making some improvements in barracks habitability and scheduling a program of of future similar improvements, and coordinating efforts with other VOLAR Officers at Fort Carson. Plaintiff continued serving as VOLAR Officer until 12 July 1971, when he was assigned to a position as Communications Officer of the First Battalion, 29th Field Artillery Division.

(6) Removing from plaintiff's record a letter dated 26 February 1977, and enclosures thereto, addressed by plaintiff to the Captain, Regular Army, Selection Board.

(7) Making up a new chronological microfiche record for plaintiff, with removals and insertions made in proper sequence, presenting no gaps or apparent obliterations.

(8) Making no use of the word "plaintiff," or in any other way referring to liti-

gation or court direction, in correcting his record, but instead referring to him by name and appropriate grade title as of the time.

d. It be suggested that the Secretary of the Army may exercise his discretionary power under 10 U.S.C. 1552 to appoint plaintiff to the grade of Captain, Regular Army (either immediately or after a reasonable period of observation of plaintiff's active duty performance as a Captain, U. S. Army Reserve.

e. The Secretary of the Army be directed, if he does not see fit to exercise his discretion under 10 U.S.C. 1552 to appoint plaintiff to the grade of Captain, Regular Army, to convene, not later than two years after the Court's announcement of its decision, a special selection board under subsection 628(b) of Title 10, U.S. Code, to determine whether plaintiff should be recommended for appointment to the grade of Captain, Regular Army, on the basis of his corrected record and performance since returning to active duty as a Captain, U. S. Army Reserve.

f. The Secretary of the Army be directed that upon subsequent appointment of plaintiff to the grade of Captain, Regular Army plaintiff's prcedence in that grade shall be so adjusted that he will not become

eligible for consideration for promotion to the grade of Major until he will have completed at least two years of continuous current active duty in the grade of Captain (Reserve and Regular) in which to bo obtain current evaluations of his performance in that grade; and that upon any subsequent promotion of plaintiff to the grade of Major, his precedence in the higher grade shall be adjusted to restore the precedence taken away in the grade of Captain.

g. The Secretary of the Army be directed to correct plaintiff's military record by inserting in his microfiche record inappropriate chronological sequence a statement to the effect that plaintiff's absence from active duty from 1 February 1978 to the indicated date of his restoration to continuous active duty was due to an administrative error, through no fault of plaintiff, and shall not be considered to plaintiff's prejudice. (Plaintiff to be described by name and grade, with no use of the word "plaintiff" or other indication of litigation or court direction.)

h. Plaintiff be granted such other relief as may be necessary to effectuate the judgment of the Court and as the ends

of justice may require.

GEORGE JOSEPH WEIDE, JR.

By /s/ Homer A. Walkup
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TEXT OF STATUTORY PROVISIONS CITED

Prior to
Defense Officer Personnel Management Act of 1980

Statutes as in effect at the time of actions
on which plaintiff's claim based

TITLE 10, U. S. CODE -- ARMED FORCES

CHAPTER 307 - THE ARMY

§ 3061. Regulations

The President may prescribe regulations for the government of the Army.

§ 3062. Policy: composition: organized peace establishment

(a) It is the intent of Congress to provide an Army that is capable, in conjunction with the other armed forces, of--

* * *

(c) The Army consists of--

(1) the Regular Army, the Army National Guard of the United States; the Army National Guard while in the service of the United States and the Army Reserve; and

* * *

§ 3063. Basic branches

(a) The Secretary of the Army may assign members of the Army to its basic branches. The basic branches are--

(1) Infantry;
(2) Armor;
(3) Artillery;
(4) Corps of Engineers;
(5) Signal Corps;
(6) Adjutant General's Corps;
(7) Quartermaster Corps;
(8) Finance Corps;
(9) Ordnance Corps;
(10) Chemical Corps;

(11) Transportation Corps;
(12) Military Police Corps; and
(13) such other basic branches as the Secretary considers necessary.

* * *

(c) The Secretary may not assign to a basic branch any commissioned officer appointed in a special branch.

§ 3064. Special branches

(a) . . . The special branches are --

(1) each corps of the Army Medical Department;

(2) the Judge Advocate General's Corps; and

(3) the Chaplains

(b) The Secretary may not assign any officer of the Regular Army to a special branch.

§ 3075. Regular Army: composition

(a) The Regular Army is the component of the Army that consists of persons whose continuous service on active duty in both peace and war is contemplated by law, and of retired members of the Regular Army.

* * *

PART II--PERSONNEL

* * *

CHAPTER 335--APPOINTMENTS IN THE REGULAR ARMY

* * *

§ 3283. Commissioned officers: appointment without specification of branch: transfer between branches.

(a) Appointments in commisioned grades in the Regular Army shall be made without specification of branch except in each of the special branches, in the Women's Army Corps, and as

professors or registrar of the United States Military Academy.

(b) Commissioned officers appointed in the Regular Army without specification of branch shall be assigned and may be transferred and reassigned, by the Secretary of the Army to branches other than the special branches and the Women's Army Corps, according to their professional qualifications and the needs of the Army.

* * *

§ 3297. Selection boards

(a) Under such regulations as he may prescribe, the Secretary of the Army shall detail selection boards, to meet at times prescribed by him, to recommend promotion-list officers and brigadier generals of the Regular Army for promotion in the Regular Army. . .

* * *

(e) Not later than 10 days after a board first meets, any officer eligible for consideration by that board is entitled to send a letter, through official channels, calling attention to matters of record in the Department of the Army concerning himself that he considers important. The letter may not contain any reflection upon the character, conduct, or motives of any officer, or criticism of any officer.

[§ 3297 was repealed in toto by Section 204 of the Defense Officer Personnel Management Act approved December 12, 1980, 94 Stat. 2880. The 1980 legislation made uniform provisions for promotion of officers of the Army, Navy, Air Force, or Marine Corps. Section 105 added new Chapters to Part II of subtitle A of Title 10, U. S. Code. The newly added Chapter 36 contains provisions relating to Promotion, Separation, and Involuntary Retirement. Subchapter I of that Chapter 36 pertains to Selection Boards. § 614 under that subchapter contains all provisions of present statutory law corresponding to § 3297(e) above. Provisions

of the currently applicable § 614 are quoted for contrast: 94 Stat. 2852:

§614. Notice of convening of selection boards: communications with boards.

(a) At least 30 days before a selection board is convened under section 611(a) of this title to recommend officers in a grade for promotion to the next higher grade, the Secretary concerned (1) shall notify in writing the officers eligible for consideration for promotion of the date on which the board is to convene. . .

(b) An officer eligible for consideration by a selection board convened under section 611(a) of this title may send a written communication to the board, to arrive not later than the date the board convenes, calling attention to any matter concerning himself that the officer considers important to his caese. The selection board shall give consideration to any timely communication under this subsection.

Note the omission of prior restraints upon officers as to matter that may be included in communications addressed to selection boards.]

§ 3299. Commissioned officers; promotion to captain, major, or lieutenant colonel.

(a) Promotion-list officers shall be promoted to the regular grandes of captain, major, and lieutenant colonel, under subsections (b) and (c), or eliminated from the active list under section 3303 of this title.

(b) Without regard to vacancies, each promotion-list officer whose regular grade is first lieutenant, captain, or major shall be considered by a selection board for promotion to the next higher regular grade, far enough in advance of the date when he will complete 7, 14, or 21 years of service. . . that if recommenced, he may be promoted on the date on which he will complete that service

* * *

§ 3303. Commissioned officers: effect of failure of promotion to captain, major, or lieutenant colonel.

(a) In this subtitle, "deferred officer" means a promotion list offi-er considered for promotion to the grade of captain, major, or lieutenant colonel under section 3299 of this title, but not recommended for promotion.

* * *

(c) A deferred officer shall be considered again by the next selection board considering officers of his grade and promotion list. . .

(d) A deferred officer who is not recommended by the next selection board considering officers of his grade and promotion list shall--

* * *

(3) if he is not eligible for retirement under. . .any. . . provision of law, be honorably discharged on such date as may be requested by him. . .but not later than the first day of the seventh calendar month after the Secretary approves the report of that board. . .

* * *

CHAPTER 339--TEMPORARY APPOINTMENTS

§ 3441. General rule

Temporary appointments may be made only in the Army without specification of component.

§ 3442. Commissioned officers: regular and reserve components: appointment in higher grade.

* * *

(c) Subject to subsections (a) and (b) [grade and strength limitations] a regular commissioned officer, or a reserve commissioned officer who is serving on active duty, may be appointed in a temporary grade that is equal to or higher than his regular or reserve grade, without vacating any other grade held by him. Under regulations to be prescribed by the Secretary, appointments made under this subsection shall be made on a fair and equitable basis. Selections

shall be based upon ability and efficiency with regard being given to seniority and age.

TEXT OF PERTINENT PROVISIONS OF ARMY REGULATIONS

Army Regulations (AR) 614-6 of January 8, 1963, related to assignments of Army personnel. The Petitioner, Weide, had been appointed as a Second Lieutenant in the Regular Army, without specification of branch, under 10 U.S.C. § 3283 (a) (81a, above); assigned by the Secretary of the Army, pursuant to § 3283 (b) (82a) to the Signal Corps basic branch (§ 3063 (a)(5), 80a); and was not subject to transfer from that basic branch nor to reassignment to any other basic branch otherwise than by authorization of the Secretary of the Army (§ 3283 (b), 82a). AR 614-6, inter alia, implemented those statutory provisions, assuring continuing Deaprtment of the Army headquarters cognizance of duty assignments made by commands having assignment authority, as did the Fourth Infantry Division in 1970-71.

AR 614-6, 8 January 1963:

1. Purpose. These regulations establish the conditions under which military personnel will be reassigned between commands or units of the Army, establish the procedures to be followed in processing requests for reassignment. . . of Army personnel both as individuals and as members of units.

* * *

3. Definitions. . .

c. . . Subject to policies outlined herein. . . commanders are authorized to effect changes of assignment. . . of military personnel between elements of their commands. . .

* * *

6. . . officers may be reassinged on PCS [permanent change of station] within CONUS [continental United States]. . . However, reassignments under this authority will not be directed without advance approval (branch clearance) of Headquarters, Department of the Army. . . Requests for branch clearance will include the information requested by paragraph 19a (1) through (4). . .

* * *

19. . . Requests will contain the following information:

* * *

(4) Full justification for the proposed move and whether a replacement will be required if the request is approved. The justification will include information as to the availability for reassignment of other similarly qualified personnel for whom exceptions to policy would not be necessary.

The second Army Regulation here pertinent is AR 623-105 of September 10, 1970, governing the submission of periodic reports evaluating the duty performance of officers. Such reports -- Officer Evaluation Reports (OERs) -- are an integral part of an Army Officer's "military record," indicating where the officer has been during periods specified as to days; the command and subsection of command in which the officer has served; duties performed; and evaluations by superiors of the evaluated officer's personality attributes and on-the-job performance. Such reports are principal personnel administration and disciplinary tools at all levels. Regulations governing the reporting system are well considered and usually rigidly enforced.

Under the Army officer evaluation system in effect in 1970-71, the key individual was known as the Rater. Qualifications for submitting a report as Rater were specifically defined by AR 623-105. One inflexible requirement was that a minimum period of sixty days observation was required before one officer could submit a substantive evaluation of another. The importance of the minimum period of required observation is illustrated by the fact that the period at a later time was increased from 60 to 90 days. The objective was double-barreled: To preclude injustice to an individual of whom a negative impression was received at the outset, but who increased in stature the longer one dealt with him; as well as to avoid doing injustice to other officers through basing an evaluation upon a brief instance of brilliant performance not matched thereafter.

The September 10, 1970, edition of AR 623-105 was in effect at the time the first report was submitted upon the Petitioner. That report rated Petitioner's performance as Communications Officer at a high level, but prejudiced Petitioner

through failing to indicate that he was being, what was thought to be at the time permanently, reassigned from the Battalion and replaced by another Signal Corps officer, and through failing to mention the reason for his transfer, which was praiseworthy so far as he personally was concerned. It was further necessary to stretch the period of that report by a few days to assure that the requisite minimum of 60 days would be indicated. In retrospect, the very high quality of the evaluation may have been prejudicial, because, (a) second lieutenants usually do not receive reports of that quality after only sixty days at their initial duty stations; and (b) the downgraded report which followed at the same duty station, though in a different position, would lead many reviewers to the conclusion that he was at best not an officer upon a superior could rely.

The second evaluation report submitted, upon Petitioner's temporary reassignment to the Battalion from 7 March through 11 July, 1971, was actually governed by a 1 April 1971 revision of the here pertinent provisions of AR 623-105. The

difference is negligible, however. Pertinent excerpts from the April, 1971, revision are set forth:

Personnel Efficiency Ratings

OFFICER EFFICIENCY REPORTS

* * *

2. REPORTING PROCEDURES

* * *

2-3. Nonrated periods. a. Every period of less than 60 duty days for company grade officersand warrant officers or 90 duty days for all other officers. . .

* * *

2-5. Designation of rater, indorser, and reviewers.
a. Rater.

(1) A report will be prepared by the immediate superior in the rated officer's chain of command or staff who is in the best position to have personal or official knowledge of the duty performance of the rated officer. In some cases the immediate superior may not be an officer of the unit to which the rated officer is assigned, but he may be the supervisor for the rated officer's principal duty.

* * *

b. Indorser.

(1) Normally, a report will be indorsed by the officer who prepares the report of the rater. However, exceptions may be made when this would result in the indorsement being prepared by a superior who does not have personal or official knowledge of the performance of duty of the rated officer. In some cases the indorser will not be an officer of the unit to which the rater is assigned, but rather the superior officer of the rated officer's supervisor for the particular duty which the rated officer is performing.

* * *

c. Reviewer

(1) The reviewer will be a U. S. Army officer on all reports. He normally will be the officer who rates the insorser. . .

* * *

2-7. Inclosures . . . .

* * *

b. Favorable and unfavorable communications such as letters of appreciation, commendation, Article 15 proceedings, and similar correspondence will not accompany the report. AR 600-31, AR 640-98, and AR 672-5-1 outline procedures for processing such communications.

Supreme Court, U.S.
FILED
AUG 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1873

# In the Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE JOSEPH WEIDE, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

---

Petitioner claims that his honorable discharge from the United States Army in 1978 was improper because an evaluation he received in 1971 was prepared by the wrong officer.

1. Petitioner entered the Army as a Second Lieutenant in 1970 and was assigned to the Second Battalion, 10th Infantry Division at Fort Carson, Colorado. In November 1970, he was temporarily assigned to a Marksmanship Training Unit (MTU). Upon returning to the Second Battalion in March 1971, petitioner served simultaneously, but in separate capacities, under both Captain Voris and Major Park. Petitioner was promoted to First Lieutenant in June 1971, and then transferred to another unit in mid-July. Captain Voris thereafter prepared, and Major Park indorsed, an Officer Efficiency Report (OER) evaluating petitioner's performance from December 1970 to July 1971. The evaluation ranked petitioner in the 77th percentile of officers in his grade and branch. Pet. App. 17a-19a.

In 1972, petitioner reviewed his military records and found that his MTU duty had not been recorded. He also noted that he had received lower marks on the OER prepared by Captain Voris than on the preceding OER. In 1973, petitioner informed the Military Personnel Center that an MTU officer should have prepared his OER for December 1970 to March 1971. Petitioner also contended that the OER for his Second Battalion duty should have been prepared by Major Park, not Captain Voris. The Personnel Center agreed that petitioner should have been rated by an MTU officer, and corrected petitioner's records to show the December 1970 to March 1971 period as unrated. However, the Center found no evidence that Captain Voris was not petitioner's proper rater for March to July 1971. Pet. App. 19a-20a.

Petitioner was promoted to Captain in 1974, on a temporary basis, but he was not selected for permanent promotion to Captain by selection boards in 1976 and 1977. In December 1977 and again in January 1978, petitioner applied to the Army Board for Correction of Military Records (Correction Board), challenging his OER for March to July 1971. These applications were denied. On February 1, 1978, not having been selected for permanent promotion to Captain by two successive selection boards, petitioner was honorably discharged and appointed to the reserves. Pet. App. 20a-21a.

In June 1978, petitioner again applied to the Correction Board. He requested that a new OER prepared by Major Park, which rated him in the 98th percentile, be substituted for the OER prepared by Captain Voris, and that he be reinstated to active duty. After referring petitioner's application to the Personnel Center, the Correction Board denied the request, finding no evidence that Captain Voris was not petitioner's proper rater. Pet. App. 22a-23a.

2. Petitioner filed suit in the Claims Court in 1982.* Relying primarily on *Sanders* v. *United States*, 594 F.2d 804 (Ct. Cl. 1979), the court granted summary judgment for the government (Pet. App. 16a-27a). The court first concluded that a decision of the Correction Board may be reversed only if it is "arbitrary or capricious or in bad faith, or unsupported by substantial evidence, or contrary to law, regulation or mandatory published procedure." Pet. App. 25a, quoting *Sanders*, 594 F.2d at 811. In this case, the court concluded, there was nothing illegal about the Correction Board's finding that Captain Voris properly completed petitioner's OER in 1971 (Pet. App. 26a). Second, the court noted that "a decision of the Correction Board which is in error or unjust is reversible only if it is substantial and prejudicial to plaintiff" (*id.* at 25a). Since petitioner was twice promoted after 1971, and received nine OERs after 1971, the court concluded that the 1971 OER did not "substantially affect[] the Army's decision not to promote plaintiff" to Captain permanently (*id.* at 27a). Because it concluded that the government was entitled to summary judgment on these grounds, the court did not reach the government's argument that petitioner's claim was barred by laches (*ibid.*).

The court of appeals affirmed (Pet. App. 1a-10a). It first addressed petitioner's contention that, under 10 U.S.C. (& Supp. I) 1552, the Secretary of the Army, or another political appointee, must personally consider requests to correct military records. The court of appeals noted that petitioner had failed to raise the issue below (Pet. App. 3a). Assuming arguendo that the issue nonetheless was properly presented, the court rejected petitioner's argument. The court observed that this Court, in *Chappell* v. *Wallace*, 462 U.S.

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*Petitioner filed suit in the Claims Court in 1981, but the petition was dismissed without prejudice for verbosity (Pet. App. 23a n.5).

296, 303 (1983), recognized that the Secretary acts through Correction Boards. Indeed, Section 1552(a) provides that the Secretary, "under procedures established by him," acts through "boards of civilians of the executive part of that military department." The court of appeals determined that "Congress did not implicitly mandate or intend that the Secretaries of the various military departments become personally involved in record correction procedures" (Pet. App. 5a-6a).

The court of appeals next rejected petitioner's contention that the Correction Board should have granted him relief. The court noted that "[a] rebuttable presumption of regularity, correctness, and good faith attaches to administrative actions, including the actions of military administrators" (Pet. App. 6a). In this case, the court held, petitioner had failed to rebut that presumption, presenting only "conclusory statements" suggesting the falsification of records by military personnel (*id.* at 6a-7a).

Finally, the court of appeals noted that the laches question was not before it since the Claims Court had not reached that issue (Pet. App. 2a).

3. None of the four questions raised by petitioner warrants this Court's attention. Petitioner's contention (Pet. 15-16) that the Secretary of the Army must personally review records correction matters is frivolous. Petitioner fails to cite any authority in support of this argument, which runs counter to the language of Section 1552(a).

Petitioner contends (Pet. 16-18) that no "presumption of regularity" applies in this case, repeating his conclusory allegations that "military personnel administrators tacitly recognized and 'covered up' blatant falsehoods" (Pet. 17). Petitioner argues that the Correction Board erred in determining that Captain Voris properly completed his OER in 1971, basing this contention primarily on the fact that

Major Park, who indorsed the 1971 OER, prepared a substitute OER in 1978, a fact considered by the Correction Board. Petitioner does not even attempt to rebut the Claims Court's conclusion that, in any event, he was not prejudiced by the ranking he received in 1971 from Captain Voris. There is no reason for this Court to review these factual questions.

Petitioner's third contention (Pet. 18-21), that he was denied due process since the Correction Board did not grant him a hearing, was not raised or considered below. This Court does not ordinarily consider issues under such circumstances (see, *e.g., Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)), and there is no reason to depart from that practice in this case. The Correction Board explained that a hearing was not required since petitioner had failed to demonstrate "probable material error or injustice" (Pet. 21), and petitioner has not corrected that failure.

Petitioner's fourth contention (Pet. 21-26) relates to the government's laches defense, which was not reached below. He argues that "[t]he very fact that the Claims Court did not decide the case of Petitioner on the basis of laches, provides one of the strongest arguments for examining the abuses which are being perpetrated by misapplication of that doctrine" (Pet. 21). This novel argument, which is contrary to this Court's practice (see, *e.g., Moor* v. *County of Alameda*, 411 U.S. 693, 696 n.3 (1973)), totally lacks merit.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
*Acting Solicitor General*

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